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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA,
Petitioner

v.

CITIZENS FOR A BETTER ENVIRONMENT
CALIFORNIA, ET AL.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act authorizes citizen suits in federal court for violations of NPDES permit limitations. 33 U.S.C. §1365(a)(1). Citizen suits are barred, however, when they allege violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or * * * the State has issued a final order * * * and the violator has paid a penalty assessed under * * * such comparable State law." 33 U.S.C. §1319(g)(6)(A)(ii) and (iii).

In this case, the State of California, acting through its Regional Water Quality Control Board, initiated enforcement proceedings against oil refiners, including Unocal, who were unable, due to the absence of environmentally acceptable control technology, to meet the permit limit of 50 ppb for selenium. Following negotiations, petitioner Unocal and two other refiners reached a settlement with the Regional Board under which they paid the State $2 million and, pursuant to a cease and desist order, undertook extensive and costly development of selenium control technologies. In exchange, the Board agreed to defer for four and a half years the date for compliance with the 50 ppb selenium limit. The following question is presented:

> Whether the Clean Water Act bars a citizen suit alleging violations that were resolved by a State administrative order and settlement payment under a State statutory scheme comparable to the Clean Water Act, as the First and Eighth Circuits have held, or whether the bar arises only if the State agency proceeded under the specific penalty provision that corresponds to section 309(g) of the Act, as the Ninth Circuit held in this case.

LIST OF PARTIES

1. UNOCAL CORPORATION is the parent company of Union Oil Company of California.

2. UNION EXPLORATION PARTNERS, LTD. is a partnership involving Union Oil Company of California.

3. 76 PRODUCTS COMPANY is a wholly-owned subsidiary of Union Oil Company of California.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Union Oil Company of California ("Unocal") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 83 F.3d 1111 (1996). The opinion of the district court (App., *infra*, 18a-65a) is reported at 861 F.Supp. 889 (N.D. Cal. 1994).

JURISDICTION

The order of the district court denying petitioner's motion to dismiss was certified and accepted for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The decision of the court of appeals, as amended, was rendered on July 16, 1996. App., *infra*, 1a. A timely petition for rehearing was denied on August 15, 1996. *Id.* at 66a-67a. The petition for writ of certiorari is due November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 309(g)(6)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A) provides, in relevant part:

> * * * any violation -
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
>
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

STATEMENT OF THE CASE[1]

1. *Like more than 75,000 other companies and municipalities nationwide, Unocal discharges wastewater under an NPDES permit*: Unocal owns and operates a petroleum refinery near Rodeo, California. (ER 4) Treated wastewater discharged from the refinery is subject to the requirements of Unocal's National Pollutant Discharge Elimination System ("NPDES") permit, issued and enforced by the California Regional Water Quality Control Board ("Regional Board") pursuant to the provisions of the Clean Water Act. (ER 9) There are more than 75,000 active NPDES permits nationwide (http://www.epa.gov:80), held by businesses, municipalities and other entities. *See also* 137 Cong.Rec. S5902, S5928 (May 15, 1991).

Discharge of wastewater containing selenium, an element naturally occurring in crude oil, is regulated by Regional Board orders issued under the NPDES permit. (ER 9-10) On June 19, 1991, the Regional Board amended the NPDES permits for six Bay Area refiners, including Unocal. The Board set a "final" selenium mass emission rate of .85 pounds per day and a concentration limit of 50 parts per billion ("ppb") for Unocal's wastewater discharge, to be effective December 12, 1993. (ER 375) In the meantime, the Board required Unocal to comply with an interim limit of 5.6 pounds per day. (ER 376)

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[1] The facts summarized below are not in dispute and are based on the complaint as well as documents offered by the parties from State agency proceedings that were judicially noticed by the district court. (Excerpts of Record ("ER") 40, 98, 251, 297, 364 n.2) On a Rule 12 motion to dismiss, the courts may judicially notice agency records. *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

2. *Unocal and other refiners sue the Regional Board in state court to set aside the selenium discharge limits*: On September 16, 1992, the State Water Resources Control Board ("State Board") denied the refiners' administrative appeal of the Regional Board order adopting the interim and final selenium limits. (ER 242 ¶13) On October 16, 1992, the Western States Petroleum Association ("WSPA") and all six refiners petitioned in California state court for a writ of mandate to set aside the selenium limits. (ER 235) The petition contended that, with respect to selenium, Section 304(l) of the Clean Water Act (33 U.S.C. §1314(l)), does not apply to San Francisco Bay or the six refineries because the concentrations of selenium in the Bay do not exceed the "applicable [water quality] standard" for selenium. (ER 239-245; *see* ER 64 ¶6-7, 368 ¶10) The applicable United States Environmental Protection Agency ("EPA") water quality standard for selenium is 71 ppb in salt water, and 5 ppb in fresh water. 40 C.F.R. §131.36(d)(10). (ER 63 ¶3) Ambient concentrations of selenium in San Francisco Bay waters are consistently below 0.3 ppb, less than one tenth of even the more stringent fresh water standard. (ER 244 ¶16)

3. *The Regional Board initiates an administrative action to enforce its selenium limits*: In July 1993, while the state court writ proceedings were pending, the Regional Board announced that it intended to commence an administrative enforcement action against refiners that failed to meet the 50 ppb final selenium discharge limit by the December 12, 1993 deadline. (ER 54, 369 ¶11) In response to the Board's threatened action, and with the WSPA litigation pending in state court, Unocal and two other refiners, Exxon and Shell, entered into negotiations with the Board. Those negotiations resulted in a Stipulation for Settlement and Dismissal of Action ("Settlement") and the Board's issuance of a tentative Cease and Desist Order ("Order"). The Order and Settlement were presented to Regional Board members on November 9, 1993 and issued for public comment the following day. (ER 44-53, 54-60, 369-370)

The Order proposed to defer the date for compliance with the final selenium limit from December 12, 1993, to July 31,

1998. (ER 55, 59) In it, the Board explicitly found that technology did not currently exist to enable the refiners to achieve compliance with the 50 ppb final limit:

> despite extensive research and testing by the six Bay Area refiners at a cost exceeding $5 million, at present there is no known technology that is capable of removing selenium from refinery wastewater in a manner that does not produce large quantities of hazardous waste.

(ER 57 ¶9)[2] Based on this finding, the tentative Order required Unocal, Exxon and Shell to undertake a multi-million dollar project to identify a technology capable of removing selenium in an environmentally acceptable manner, to carry out pilot studies of candidate technologies, and to implement a removal technology or other control strategy to meet the final limits by the new 1998 compliance date. In the meantime, the refiners were obligated to continue to comply with the interim selenium discharge limit. (ER 58-59 ¶1-6)[3] As the second key feature of the negotiated disposition, the proposed Order and Settlement required Unocal, Exxon and Shell to pay $2 million to the State penalty fund and Selenium Mitigation Fund, in two installments of $1 million each. Unocal's share was $780,000. (ER 57 ¶14, 50-51 ¶4)

4. *The Regional Board enters into a Settlement and issues an Order requiring Unocal to make a substantial payment to the State, develop control technology, and meet a revised compliance schedule*: The Regional Board conducted noticed public hearings on the proposed Order and Settlement on December 15, 1993 and January 19, 1994. Testimony and written comments were received from respondent Citizens for a Better Environment ("CBE") and other members of the public. (ER 113-152)

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[2] The Board also found that the only two existing technologies that showed "any promise" did not reduce selenium below the final 50 ppb limit "on a consistent basis." (ER 57 ¶¶9-10, 369 ¶12)

[3] It is undisputed that Unocal has consistently complied with the "interim" selenium limit set by the Board. (ER 292)

In response to testimony by a CBE representative suggesting that the $2 million payment by the refiners was not a penalty (ER 137-138), a member of the Regional Board stated the payments were "penalties, that's plain and simple what it is." (ER 140:5) No other Board member disagreed.

In its written comments on the proposed Order and Settlement, EPA expressed enthusiastic support: "We support a settlement of the [state court] lawsuit since it may be the most effective approach for expediting a reduction in selenium discharges. The [Regional Board] staff have worked diligently to resolve selenium issues in San Francisco Bay ... We are also happy to see the [Board] take enforcement action with the proposed Cease and Desist Order (CDO) ... According to the settlement the refineries will pay a $2 million penalty that will fund: [studies, projects and research]." (ER 253-254, 371 ¶16)

Following the January 19, 1994, public hearing, the Board adopted the final Order and Settlement. App., *infra*, 69a-88a. In accordance with the Order and Settlement, Unocal and the other refiners dismissed their state court writ petition challenging the selenium limits, the Board deferred the final selenium limit until July 1998, and Unocal, Exxon and Shell made the initial $1 million payment within 30 days. The remaining $1 million was paid on January 31, 1995. Unocal timely paid its $780,000 share of the required payments. (ER 68, 79, 95-97)

Although state law (Cal. Water Code §§13320, 13330) authorized administrative and judicial review of the Regional Board Order and Settlement, neither CBE nor any other person sought review by the State Board, or by filing an action in state court. (ER 371-372 ¶¶18-19)

5. *The district court refuses to dismiss CBE's Clean Water Act citizen suit for the same alleged violations*: On March 2, 1994, CBE filed this Clean Water Act citizen suit under 33 U.S.C. §1365(a)(1), seeking civil penalties and an injunction for alleged violations of the 50 ppb selenium discharge limit that had been deferred until 1998 by the Regional Board in accordance with the Order and Settlement. (ER 1-2) (ER 2)

Unocal moved to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), contending that the complaint failed to state a cognizable legal claim and that the district court lacked jurisdiction over this citizen suit. Because the Regional Board had already diligently prosecuted an enforcement action against Unocal for the same violations of the final selenium limits alleged in the complaint, Unocal argued that CBE's citizen suit was barred by section 309 of the Act on the ground that the State's action had been taken under "a State law comparable to" section 309(g) and Unocal had "paid a penalty assessed under * * * such comparable State law * * *." 33 U.S.C. §1319(g)(6)(iii). (ER 29-23)

The district court denied Unocal's motion to dismiss, concluding that the Regional Board's enforcement action was not a bar to this citizen suit because (i) the Board's action was not taken pursuant to a "provision" of California law comparable to section 309(g), and (ii) the payment made by Unocal did not constitute a "penalty" because the Order and Settlement did not label it as such. App., *infra*, 42a-60a.

6. *Unocal appeals*: On Unocal's application, the district court certified its decision for interlocutory appeal, finding that "there is substantial ground for difference of opinion" on the correctness of its ruling of this potentially case-dispositive issue. (ER 382) Two circuits had addressed the same issues and reached conclusions in conflict with the district court's decision. *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1991); *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, _____ U.S. _____, 115 S.Ct. 1094 (1995). The Ninth Circuit accepted jurisdiction pursuant to 28 U.S.C. §1292(b). (ER 384)

7. *The Ninth Circuit affirms, acknowledging that its decision conflicts with those of two other circuits*: The Ninth Circuit affirmed (App., *infra*, 1a), rejecting Unocal's argument that its payment of $780,000 to the State was a "penalty" under a "comparable state law" within the meaning of section 309(g)(6)(A)(iii) of the Act. Instead, the court held that the payment was not a "penalty" but "a settlement made to avoid an

enforcement action by the Regional Board." App., *infra*, 9a.[4] It also rejected Unocal's argument that the "comparable State law" clause was satisfied because the Regional Board acted pursuant to a statute (Water Code Section 13301) that was part of a *statutory scheme* that included penalty provisions comparable to section 309(g). Cal. Water Code §§13308, 13323-13328, 13350, 13385. Instead, the court held that to preclude a citizen suit for the same violations, the comparability clause required the Regional Board to act pursuant to the *specific* statutory penalty *provision* that corresponded to the administrative penalty provision in section 309(g). App., *infra*, 10a. In reaching this conclusion, the Ninth Circuit acknowledged that its view of the comparability clause was in conflict with decisions of the First and Eighth Circuits in *Scituate* and *Arkansas Wildlife*, each of which had held that the clause was satisfied if the State agency action was taken under a statutory *scheme*, comparable to the Act, that contains a penalty provision like section 309(g). App., *infra*, 10a. Unocal's timely petition for rehearing and rehearing *en banc* was denied on August 15, 1996. *Id.* at 11a. Over CBE's objection, the Ninth Circuit granted Unocal's motion for stay of mandate pending certiorari. *Id.* at 68a.

REASONS FOR GRANTING THE PETITION

Petitioner Unocal respectfully petitions this Court to grant certiorari in this case to resolve recurring and important questions dividing the circuits as to the proper role of citizen suits in enforcing the Clean Water Act.[5]

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[4] Although it is true that the Regional Board and Unocal reached a settlement, the Regional Board characterized its Order as an "enforcement action." (ER 158) Moreover, EPA's comment on the proposed order applauded the Regional Board's "enforcement action." (ER 253)

[5] In addition to this case, the following is a non-exhaustive list of cases that have addressed section 309(g) of the Act, to (1) limit citizen suits: *Arkansas Wildlife*, 29 F.3d at 381; *Scituate*, 949 F.2d

There are currently more than 75,000 NPDES permits in existence, and there have been hundreds of citizen suits seeking judicial enforcement of such permits or of the discharge limitations of the Clean Water Act itself.[6] Many of those citizen suits, like the one at issue here, involve situations in which there is a pending or completed administrative enforcement proceeding. The proper interpretation of Section 309(g)(6)(A) of the Clean Water Act, the provision barring citizen suits in certain circumstances in which there has been prior regulatory action involving the same alleged violations, is thus a matter of vast practical importance.

The question affects not only businesses, municipalities, environmental regulators, and would-be citizen plaintiffs, but also the federal courts. Under the narrow interpretation given by the Ninth Circuit in this case to the provision barring certain citizen suits, there is a real danger that the federal courts will be called upon to displace state and federal environmental regulatory agencies as primary enforcers of the Clean Water Act.

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at 556; *Saboe* v. *Oregon*, 819 F.Supp. 914 (D. Ore. 1993); *Connecticut Coastal Fishermen's Ass'n* v. *Remington Arms Co.*, 777 F.Supp. 173 (D. Conn. 1991); *aff'd in part rev'd in part* 989 F.2d 1305 (2nd Cir. 1991); *California Sportfishing* v. *City of W. Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995); *Sierra Club* v. *Colorado Refining Co.*, 838 F.Supp. 1428 (D. Col. 1993); or (2) allow citizen suits: *Knee Deep Cattle Co., Inc.* v. *Bindana Inv. Co. Ltd.*, 94 F.3d 514 (9th Cir. 1996); *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993); *Molokai Chamber of Commerce* v. *Kukui, Inc.*, 891 F.Supp. 1389 (D. Hawaii 1995); *Atlantic States Legal Foundation Inc.* v. *Universal Tool & Stamping Co.*, 735 F.Supp. 1404 (N.D. Ind. 1990); *Natural Resources Defense Counsel* v. *Vygen Corp.*, 803 F.Supp. 97 (N.D. Ohio 1992).

[6] In 1988, a survey of 1,209 citizens suits revealed that 882 had been filed under the Clean Water Act. BNA, *Environmental Citizen Suits: Confronting The Corporation* (1988).

The principal underpinning of the Ninth Circuit's ruling is its conclusion that the "comparable State law" provision of Section 309(g)(6)(A) requires not merely that the state law under which the regulators have proceeded be generally comparable to the enforcement provisions of the Clean Water Act, but that they have proceeded specifically under a provision identical to Section 309(g). This ruling is in direct and acknowledged conflict with decisions of the First and Eighth Circuits (*North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1992); *Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1094 (1995)), which apply the bar to citizen suits so long as the state regulatory proceeding has been conducted under a generally comparable scheme that contains a penalty provision analogous to Section 309, even if the enforcement action does not happen to have been brought directly under the Section 309 analog.

In addition, the court below misconstrued the "penalty assessed" requirement by treating the very substantial monetary payment made to the State on account of the selenium discharges as purely a settlement payment but not a penalty. This ruling also conflicts with the Eighth Circuit's *Arkansas Wildlife* decision, which recognized that the citizen suit preclusion should apply when "a compromise was reached." 29 F.3d at 380.

Finally, as we discuss below, the Ninth Circuit's allowance of citizen suits when state regulators have diligently proceeded with and consummated enforcement proceedings subverts the primacy that the Clean Water Act seeks to give to administrative enforcement efforts and is in substantial tension with the prior decision of this Court in *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation*, 484 U.S. 49 (1987), as well as with decisions of lower courts. Review by this Court is needed in order to clarify the uncertainties that now surround the availability of the citizen suit to trump state enforcement efforts.

A. The Ninth Circuit's Decision Impermissibly Allows Citizen Suits To Intrude Upon State Enforcement Discretion Under The Clean Water Act, Contrary To This Court's Decision In *Gwaltney*

In 1987, this Court held that the role of a Clean Water Act citizen suit was "to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 61, 108 S.Ct. at 383. In rejecting a contention that a citizen suit could be brought for wholly past violations, this Court offered an example that appears plainly inconsistent with the Ninth Circuit decision here:

> Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obligated to take. *If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.* Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. *We cannot agree that Congress intended such a result.*

Id. at 61, 108 S.Ct. at 383 (emphasis added).

Congress indeed did not intend such a result. In fact, soon after the *Gwaltney* decision, Congress further narrowed the interstitial role[7] of citizen suits by enacting the provision at

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[7] The enforcement authority of the EPA and the states is broader than that of a citizen under the Act. As this Court made clear in

issue here, section 309(g)(6), which bars such suits when the Administrator of EPA or the state regulator had initiated or concluded administrative enforcement proceedings. Specifically, this provision bars a citizen suit when (i) the Administrator has commenced and is diligently prosecuting an administrative penalty action, (ii) a State has commenced and is diligently prosecuting an administrative action under a state law comparable to Clean Water Act section 309(g), or (iii) the Administrator or the State has issued "a final order not subject to further judicial review and the violator has paid a penalty [under § 309(g)] or such comparable State law."[8]

In this case, the State of California, acting through its Regional Water Quality Control Board, commenced an administrative enforcement action in 1993, alleging violations of new final NPDES permit limits for selenium discharges. Following negotiations with Unocal and other dischargers and noticed public hearings, the Board issued a final Order pursuant to a Settlement under which Unocal and two other oil refiners were required to pay $2 million, undertake multi-million dollar research efforts to develop selenium control technology, and achieve compliance with the final selenium limits by July 1998, all while maintaining compliance with interim selenium limits.[9]

Gwaltney, the government may seek penalties for both wholly past violations and for ongoing violations of the Act pursuant to sections 309(d) and (g), but a citizen suit is limited under section 505(a) to ongoing violations only. 33 U.S.C. §§ 1319(d), (g), 1365(a)(1); *Gwaltney*, 484 U.S. at 56-59; 108 S.Ct. at 381-382; *see* Cal. Water Code § 13385(a).

[8] Prior to 1987, a citizen suit was barred only by an EPA or State action diligently prosecuted *in court*. 33 U.S.C. § 1365(b)-(1)(B); *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987).

[9] Unocal has consistently and completely complied with the Regional Board's Order, having paid its share of the $2 million that was ordered, pursued selenium control technology projects, and

The State's administrative enforcement of the Clean Water Act makes citizen enforcement both unnecessary and inappropriate. Citizen enforcement is unnecessary because the Board had already taken diligent enforcement action for the selenium violations now alleged in the citizen suit. Citizen enforcement is inappropriate because, as this Court contemplated in *Gwaltney*, the government accomplished exactly what it intended by initiating enforcement — it recovered money from the dischargers, obtained commitments to develop a viable selenium control technology, and established a schedule for compliance with final selenium limits.

The citizen plaintiffs contend, however, that Unocal is currently in violation of the final selenium limits, which the Board deferred to July 1998 by the Order and Settlement. The Ninth Circuit's authorization of the citizen suit despite state administrative enforcement has thus created the untenable result that Unocal now has two selenium limits: (1) the interim 5.6 pounds per day limit that the Board Order required Unocal to meet until July 1998, and (2) the deferred .85 pounds per day (and 50 ppb) final limit. The Ninth Circuit has concluded that this final limit can be a basis for a citizen suit *now*, before the compliance date set by the Regional Board.

Moreover, the citizen suit seeks an award of civil penalties — payable to the government[10] — even though the State

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consistently achieved 100 percent compliance with the mandated interim selenium limits. (ER 95-97, 292)

[10] The Clean Water Act did not create a private right of action for citizens. The citizen suit may be brought for penalties payable only to the government, not for damages to the citizen or citizen group. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11, 101 S.Ct. 2615, 2621 (1981). Where the government has either accepted an amount in compromise, or agreed to forego civil penalties altogether, a subsequent citizen suit undermines the enforcement discretion of the Administrator or the State. *Gwaltney*, 484 U.S. at 61.

has already settled its civil penalty claims with the dischargers, has collected $2 million, and has imposed significant and costly compliance obligations.

If allowed to stand, the Ninth Circuit decision would create the following Clean Water Act enforcement anomalies:

- Congress intended that the government have broad enforcement authority and that citizen suits perform a narrow "interstitial" role. In this case, neither the EPA Administrator nor the state agency can enforce final selenium limits until July 1998; yet the Ninth Circuit has allowed a citizen suit to seek injunctive relief to enforce those deferred final limits now.
- The State decided to resolve its civil penalty claims for $2 million, plus selenium treatment technology projects not otherwise required of the dischargers, and a final selenium compliance schedule. EPA applauded the State's enforcement action, including the "penalty." Yet, the Ninth Circuit has allowed a citizen suit to seek civil penalties payable to the government in an amount greater than the government accepted as appropriate.[11]

The result of the Ninth Circuit opinion is an expansion of citizen suit enforcement beyond the supplemental role created by Congress and described by this Court in *Gwaltney*, which role was narrowed further by Congress in 1987. Under the Ninth Circuit opinion, a citizen suit may be brought to seek penalties

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[11] In the California Regional Board proceedings, CBE urged the government to require *larger* penalty payments from the dischargers. (ER 137-138) California law afforded CBE a right of administrative review of the Regional Board's order by the State Water Resources Control Board, and judicial review by the California courts. Cal. Water Code §§13320, 13330. CBE chose not to pursue *any* review of the Order under applicable state law, including review of the amount that the dischargers were required to pay. The Order became "final" for purposes of section 309(g) after 30 days. *Id.*

the government has chosen to forego, and to seek injunctive relief contrary to the terms of the State's own compliance order, regardless of how diligent and thorough the State's enforcement action has been.

B. The Decision Below Violates The Section 309(g) Bar On Citizen Suits, Offends The Strong Public Policy Favoring Settlements, And Conflicts With Decisions Of The First And Eighth Circuits.

The Ninth Circuit held that "the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board" and "not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action." App., *infra*, 8a.[12]

The Ninth Circuit's unprecedented distinction between payment of a civil penalty after a formally adjudicated, publicly contested enforcement action and payment of a settlement amount to resolve civil penalty liability after formal public comment and hearings (1) is contrary to decisions of the First and Eighth Circuits interpreting the "comparable State law" provision of the Act, (2) is based on a narrow view of the "comparable State law" provision that is at odds with the language and intent of the Act, (3) misconstrues the "penalty assessed" provision of the Act by excluding payments made to settle state enforcement actions, and (4) undermines the strong national policy favoring settlement rather than protracted litigation of disputes.

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[12] The Ninth Circuit wrote: "UNOCAL itself insisted on characterizing the financial transfer as a 'payment' and not a 'penalty' at the time of the state action settlement." App., *infra*, 8a. This not a fair characterization of the record. At the December 15, 1993 administrative hearing before the Regional Board, Unocal's counsel said, " * * * I think, for all practical purposes, it is, in fact, a penalty. It's viewed by EPA as a penalty in its letter. I think the Board considers it a penalty." (ER 150:15-18)

1. The Ninth Circuit's interpretation of the "comparable State law" provision conflicts with decisions of the First and Eighth Circuits.

The Ninth Circuit acknowledged that California Water Code section 13385, the State penalty provision, is comparable to section 309(g). App., *infra*, 9a. But it concluded that Unocal's $780,000 payment was not assessed or paid under section 13385, and was instead the product of a settlement embodied in the Cease and Desist Order issued under Water Code section 13301. Because section 13301 was cited by the Regional Board (*id.* at 77a-78a) and because that specific section of the Water Code does not contain a penalty provision, the Ninth Circuit held that Unocal's payment was not assessed under a law comparable to section 309(g). App., *infra*, 11a. The Ninth Circuit acknowledged, however, that its view of comparability was in conflict with that of the First and Eighth Circuits. *Ibid.*

In *Arkansas Wildlife*, the Eighth Circuit considered whether section 309(g)(6)(A)(ii)[13] of the Act barred a citizen suit alleging violations embraced within a State administrative settlement and consent order that provided for a compliance schedule and $2,500 in negotiated penalties. The citizen suit plaintiff argued that the administrative order was issued under a *provision* of State law that was not comparable to section 309(g). The Eighth Circuit rejected plaintiff's argument, holding that the State administrative order precluded a citizen suit for the same violations that had been settled because the State had taken diligent enforcement action under a State law *scheme* that was comparable to section 309(g). *Arkansas Wildlife*, 29 F.3d at 381-382. It observed that "the states are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Id.* at 380. The court accordingly held that "comparability" is satisfied when the state's "overall regulatory

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[13] This case concerns section 309(g)(6)(A)(iii), not section 309(g)(6)(A)(ii), addressed in the First and Eighth Circuit cases. However, the plain language and structure of the statute shows that the "comparability" inquiry is the same under both subsections.

scheme" under which the agency acted: (1) "contains comparable penalty provisions," (2) has "the same overall enforcement goals," and (3) provides citizens "a meaningful opportunity to participate" in the decision-making process so as to safeguard their interests. *Id.* at 381.

Similarly, the First Circuit in *Scituate* rejected the plaintiff's argument in that case that to be "comparable" to section 309(g) and thereby preclude a citizen suit, it is necessary that "the precise statutory section under which the State issued its Administrative Order contains penalty provisions comparable to the Federal Act." *Scituate*, 949 F.2d at 556. The First Circuit reasoned instead that "comparability" under subsection (A)(ii) was satisfied when the overall state statutory scheme contained a penalty provision comparable to the Act and the State agency was diligently prosecuting an enforcement action under that scheme. From that premise, the First Circuit held that a citizen suit was barred whether or not the state agency actually imposed a "penalty." *Scituate*, 949 F.2d at 555-557; *accord Supporters to Oppose Pollution, Inc.* v. *The Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (citing *Scituate* with approval in a RCRA citizens suit). The First Circuit further reasoned that because Congress amended the Act for the express purpose of precluding duplicative citizen suits after a state agency has already taken enforcement action, deference to diligent state administrative action is required whether or not the penalty provision is employed in any particular case. *Scituate*, 949 F.2d at 556.[14]

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[14] The Ninth Circuit rejected *Scituate* by relying on its earlier decision in *Pendleton*, 11 F.3d at 885. App., *infra*, 11a. In fact, *Pendleton* is not controlling here because it did not address citizen suit preclusion by State enforcement action. Rather, *Pendleton* addressed very different language in subsection (A)(i) precluding citizen suits when EPA prosecutes an action "under this subsection." *Pendleton*, 11 F.3d at 886. "Comparability" was not an issue in *Pendleton*.

Unocal's case is far more compelling not only because the Board acted pursuant to a California statutory scheme that the Ninth Circuit acknowledged contains a "comparable" penalty provision but also required Unocal to pay $780,000, commit to a multi-million dollar research and development effort to implement an environmentally-acceptable selenium control technology, and agree to achieve compliance with the final selenium limit by July 1998 and to comply with the interim selenium limit until that date. (ER 68)

2. The Ninth Circuit's "comparability" rationale is not required by the plain language of the Act and is contrary to the intent of the Act.

None of the three reasons cited by the Ninth Circuit to support its narrow view of "comparability" withstands analysis.

First, contrary to the Ninth Circuit's grudging view, it is not clear that requiring State agency reliance on the precise provision in State law authorizing administrative penalties "is the plainest reading" of the words "comparable State law." App., *infra*, 12a. Congress explicitly stated that comparable means "similar" or "analogous," not identical. 1 *Legislative History of Water Quality Act of 1987*, at 367 ("*Leg. Hist.*").

In fact, an earlier version of the 1987 legislation contained a provision requiring the State agency to be "diligently pursuing assessment of a civil penalty under section 309(g) of this Act." 2 *Leg. Hist.* 1103, 1174 (1987). That more specific provision was deleted and the more general "comparable State law" language was enacted instead. As the concurring opinion in *Scituate* aptly reasoned, requiring the State agency to recite precisely the State law penalty provision which was the source of its action would "Balkanize" the intended uniform application of the Act by having comparability turn on semantics rather than substance. *Scituate*, 949 F.2d at 559 (concurring opinion).

Second, the Ninth Circuit found comparability lacking because settlements might not be subject to public notice, comment and assessment procedures applicable to penalties to ensure the amount is of sufficient "magnitude." App., *infra*, 12a. The

hypothetical concern about the need for public scrutiny is not supported by the law or the record of this case. The California statutory scheme governing the Order and Settlement, consistent with the federal regulations, requires public scrutiny that matches the requirements of the federal statute, specifically including notice, public comment and a public hearing. Cal. Water Code §§13301, 13302; 40 CFR §123.27(d)(2)(iii). CBE actively participated in all aspects of this public review process, including *two* public hearings. (ER 43-60, 113-159) Both *Scituate* and *Arkansas Wildlife* held that to be comparable, the review proceedings under the state statutory scheme need not be identical to federal law, but only must ensure a similar level of public participation. That standard was plainly exceeded in this case.

Similarly, the "amount" or "magnitude" of the payment does not determine whether the settlement was a penalty; these words do not appear in section 309(g)(6)(A)(iii). In fact, a proposal to require that the amount of "the State imposed penalty is appropriate" was deleted from the 1987 amendments of the Act. *Compare*, 2 *Leg. Hist.* 828 and 1162 (1987). That deletion indicates that no such requirement exists. *Russello* v. *United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 300-301 (1983).

In any event, the amount paid by Unocal, $780,000, not only far exceeded the $2,500 penalty upheld by the Eighth Circuit in *Arkansas Wildlife*, but is five times the $125,000 maximum penalty that EPA could have imposed under the federal statute. 33 U.S.C. §1319(g)(2)(B). Thus, by any standard, the amount paid by Unocal is plainly "comparable" to any penalty authorized by the federal statute. If EPA believed that the Settlement was inadequate, it could have filed its own penalty action. 40 CFR §123.27(c). Instead, EPA blessed the Settlement, including the "penalty" paid. (ER 253-254)

Third, the Ninth Circuit thought it would be "anomalous" to conclude that State agency enforcement actions "would more broadly preclude citizen suits" than EPA enforcement actions. App., *infra*, 12a. In fact, the language and structure of the Act

does provide for broader preclusion based on State agency actions. Section 1251(b) expressly states: "[i]t is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b) (emphasis added). And the Ninth Circuit has elsewhere recognized that section 1251(b) expresses the intent of the Act to "afford states as much control as possible over implementation and enforcement of pollution controls." *Boise Cascade Corp.* v. *U.S.E.P.A.*, 942 F.2d 1427, 1433 (9th Cir. 1991).

The legislative history of the Act likewise makes clear the primacy of State agency enforcement and that such primacy is grounded in federalism: "The Committee again, however, notes that the authority of the federal government should be used judiciously by the Administrator in those cases [that] deserve federal action because of their national character, scope or seriousness. The Committee intends the great volume of enforcement actions be brought by the State." Sen. Rep. No. 92-414, 92d Cong. 1st Sess., p. 64 (1971).

Citing this Congressional history, this Court concluded that citizen suits are proper only when State agencies fail to exercise their enforcement responsibility. *Gwaltney*, 484 U.S. at 60. In this case, the Regional Board took vigorous enforcement action, so the duplicative citizen suit seeking to have the federal courts second-guess that action is unnecessary and should be barred.

3. The Ninth Circuit decision misconstrues the "penalty assessed" provision of the statute by excluding payments made to settle state enforcement actions.

Section 309(g)(6)(A)(iii) of the Act provides that a citizen suit is barred when "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be * * *." 33 U.S.C. §1319(g)(6)(A)(iii).

The Ninth Circuit's decision draws an unwarranted and unnecessary distinction between civil penalties imposed follow-

ing an adjudicated enforcement proceeding and amounts paid in settlement to resolve the state's civil penalty claims in administrative enforcement proceedings. The Regional Board did take administrative enforcement action against Unocal (App., *infra*, 69a-81a), and it settled that enforcement action following an open public process that included notice, public comment, and hearings in which CBE actively participated. (ER 43-60, 113-152, 153-159, 253-255). The settlement required, among other things, substantial payments by Unocal and others to resolve the State's civil penalty claims.

For purposes of the citizen suit bar, it should make no difference whether Unocal paid something formally denominated a "penalty" following administrative adjudication, or whether Unocal paid to settle the civil penalty claims asserted by the state. Congress intended to encourage, not discourage, settlement of penalty actions as a means of funding environmental protection projects and thus furthering the goals of the Act. 2 *Leg. Hist.* 828. EPA regulations interpreting the Act likewise provide for "settlement of a State enforcement action" following notice and public comment on the proposed settlement. 40 C.F.R. §123.27(d)(2)(iii).

In direct conflict with the Ninth Circuit, the Eighth Circuit observed that "it would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the dischargers] prevailed in some fashion or because a compromise was reached." *Arkansas Wildlife*, 29 F.3d at 380. The court rejected an argument that the State had negotiated and accepted "insignificant amounts of civil penalties" in comparison to the maximum penalties that could have been assessed. *Id.* Thus, the Eighth Circuit's reasoning recognizes that a payment in settlement qualifies as a "penalty assessed" under the statute.

By contrast, the Ninth Circuit constructed an artificial distinction between a "penalty" resulting from a "formal enforcement action" by the State and a settlement paid to the State to resolve civil "penalty" liability. App., *infra*, 9a. Both should be viewed as a "penalty assessed" for purposes of the citizen suit bar in section 309(g). 33 U.S.C.

§1319(g)(6)(A)(iii). However, under the Ninth Circuit's view, a settlement would apparently never constitute "a penalty assessed" under the Act, even if the word "penalty" were used to describe a payment made by a discharger to resolve its potential penalty liability.[15]

In fact, the Ninth Circuit opinion fails to mention that the EPA and the Regional Board *did* consider the settlement payment to be a "penalty." EPA stated: "We are also happy to see the RWQCB *take enforcement action* with the proposed Cease and Desist Order * * *. According to the *settlement*, the refineries will pay a $2 million *penalty* that will fund * * * consultants to oversee the treatment technology research." (ER 253-54, emphasis added)[16] Similarly, a Regional Board member stated at one of the two public hearings: "It is *penalties*, that's plain and simple what it is." (ER 140:5, emphasis added) No other Board member disagreed.

Apart from the stated beliefs of the two agencies charged with enforcement of the Act, Unocal's $780,000 payment was a penalty in substance and as a matter of law. There is nothing else it could have been; no other civil payment is contemplated by State law or the Act. Indeed, ten percent of the payment was specifically earmarked for deposit in the account designated for

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[15] Although the payment was not labelled a "penalty" in the Settlement (App., *infra*, 84a-85a) this Court has recognized that the "label" used is not controlling; it is the "substance" of the action that is relevant. *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 492-493 (1958). In fact, the specific section of state law that the Ninth Circuit and CBE agree is a "comparable" penalty provision, Water Code section 13385, does not use the label "penalty" but rather the term "civil liability."

[16] After filing its citizen suit, CBE asked EPA to "clarify" its position. EPA responded: "Although the comment letter describes the payment of money by the refineries as a 'penalty,' this term was not used with any intention of describing the preclusive effect of that payment under section 309(g)(6)." (ER 299)

civil penalties by State law. App., *infra*, 84a-85a. Cal. Water Code §13385(i). The remainder of the payment went to a new State Selenium Mitigation Fund, consistent with the intent of Congress that "settlements of fines and penalties" be "used to fund research, development and other related projects which further the goals of the Act." 2 *Leg. Hist.* 828 (1987).

The Ninth Circuit also reasoned that the $780,000 payment was not a "penalty" because, in considering its enforcement options, the Regional Board declined to invoke its administrative penalty authority under Water Code section 13385. App., *infra*, 7a. Instead, the Board invoked the cease and desist order provision, Water Code section 13301, stating: "the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order." App., *infra*, 77a-78a.

The flaw in the Ninth Circuit's reasoning is that there was no need for the Regional Board to invoke the state penalty statute because the refiners, including Unocal, had already agreed to settle their penalty liability with a $2 million payment. The Board cited section 13301 because that statute provided legal authority for issuing the cease and desist order and undertaking the remainder of the settlement: (1) requiring the refiners to study, develop, and implement selenium control technology, and (2) deferring compliance with the final selenium limit to 1998. App., *infra*, 78a-80a. *See* Cal. Water Code §13301 (empowering Board to issue cease and desist orders requiring "appropriate remedial or preventive action" and directing the discharger to "comply in accordance with a time schedule set by the Board").

The Order issued by the Regional Board and the Settlement were fully consistent with the Clean Water Act and this Court's interpretation of the Act in *Gwaltney*. This Court held that state and federal authorities have discretion "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action." *Gwaltney*, 484 U.S. at 60-61, 108, S.Ct. at 383. In this case, Unocal was ordered to undertake groundbreaking selenium control technology, an expensive

project (App., *infra*, 72a-73a), because the Board recognized that no such technology existed. *Id.* at 72a-76a. The Board *also* collected $2 million as part of the settlement.[17]

In sum, a payment "assessed" by the State should be considered a penalty for purposes of section 309(g) of the Act whether it is the result of a formal administrative adjudication proceeding or a negotiated settlement. A penalty that is the product of a settlement of an administrative enforcement proceeding by a state agency is no less a product of the enforcement authority that gives rise to the citizen suit bar than a penalty paid following adjudication of the State's administrative claims. Congress drew no distinction between adjudicated penalties and penalties paid in settlement, and the courts should not do so either.

4. The Ninth Circuit's decision violates strong public policy favoring settlements.

The Ninth Circuit held that a discharger who settles an administrative penalty action brought by the government does so at the peril of confronting a subsequent citizen suit for the same claims that were settled.

Carried to its logical conclusion, the Ninth Circuit decision will dissuade NPDES dischargers from settling Clean Water Act

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[17] The Ninth Circuit mistakenly accepted the assertion of the United States, as *amicus curiae*, that the Board's failure to invoke the state penalty statute allowed Unocal to avoid review of the amount of the penalty pursuant to the penalty assessment factors in the state statute, Water Code section 13385(e), analogous to those in section 1319(g)(3) of the Act. App., *infra*, 8a-9a. In fact, there can be no plausible claim that the penalty was inadequate. The Board was presumably aware of the assessment factors, but it was not required to address them expressly because the amount was determined by settlement, not by a contested enforcement proceeding. Indeed, the amount collected from Unocal, $780,000, far exceeded the $125,000 maximum penalty EPA can assess even using the statutory factors. 33 U.S.C. §1319(g)(2)(B).

administrative claims brought by federal or state agencies. As courts have recognized, "It is doubtful that an alleged violator would fully cooperate with [the State agency] to resolve [certain violations] if they lacked assurance that the same violation would not be the subject of a citizens suit in federal court at some later time." *Saboe* v. *Oregon*, 819 F.Supp. 914, 918 (D.Or. 1993). Instead of focusing their resources on negotiated environmental research and corrective action, dischargers would have to engage in protracted and expensive litigation.

Thus, the Ninth Circuit decision deters the very kind of dispute resolution the law should encourage: an arm's-length, good-faith settlement between the agency and the regulated party, arrived at on threat of formal action, but resolved with concessions by both sides before formal adversary proceedings became necessary. Settlement allows the parties to focus their resources on developing technology to improve water quality rather than on litigation. Such agreements, especially when subject to public scrutiny and blessed by EPA, must be upheld not undermined.

Under the Ninth Circuit's narrow view of the Act, such timely, negotiated resolutions of enforcement actions will be insufficient to preclude unnecessary, duplicative citizen suits, even when the agency has given the public and EPA ample opportunity for scrutiny and comment and State law affords the right to judicial review of the agency action. Nothing in the Act justifies the Ninth Circuit's counter-productive conclusion.

Such an outcome not only cannot be what Congress intended but also violates this nations's strong public policy favoring the settlement of disputes to avoid protracted and wasteful litigation. This Court has consistently recognized that settlement of disputes is strongly favored and should be encouraged to preserve scarce judicial resources and ease crowded court dockets. *E.g.*, *Williams* v. *First National Bank*, 216 U.S. 582, 595, 30 S.Ct. 441, 445 (1910); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017 (1974).

As this Court recognized in *Gwaltney*, duplicative and unnecessary citizen suits that simply replicate diligent state

administrative enforcement actions that have been resolved by settlement undermine important national environmental policies. 484 U.S. at 60-61. Without the authority to enter into a settlement that bars a citizen suit, the state loses a crucial weapon in its arsenal for achieving the Act's water quality goals, directing its effort at environmental corrective action rather than litigation, with its attendant costs and delay. The policy favoring settlement "has particular force" where an agency "has pulled the laboring oar" to reach agreement that will "promote early completion of cleanup activities." *United States* v. *Cannons Engineering Corp.*, 899 F.2d 79, 84, 90-91 (1st Cir. 1990).

The Ninth Circuit's holding that a settlement payment cannot be a penalty subverts the structure of the Act and invites pointless litigation. In the Ninth Circuit, a permittee now must fight rather than settle in order to avoid a citizen suit. Such a result is contrary to public policy and this Court's decision in *Gwaltney*.

In sum, this Court should grant certiorari to resolve the nationally significant issues created by the Ninth Circuit's narrow view of both the "penalty assessed" provision and the "comparable State law" requirement. The Ninth Circuit's approach should be rejected in favor of the better founded decisions of the First and Eighth Circuits precluding citizen suits when state regulatory action leads to a settlement, and finding comparability based on the overall statutory scheme under which the State agency acted.

C. The Issue Presented Is A Recurring One Of National Significance.

Under the Clean Water Act, every discharger of wastewater to the waters of the United States must have an NPDES permit. 33 U.S.C. §1342. There are more than 75,000 active NPDES permits nationally. All such dischargers must deal either with a state agency or EPA on compliance issues every time a permit standard is arguably exceeded. Under the Ninth Circuit decision, even if the agency and the discharger agree on a compliance or enforcement solution, the discharger may be

subject to a costly citizen suit second-guessing and potentially undermining the agency determination.

For example, based on the decision in this case, another Ninth Circuit panel recently held that a citizen suit is not barred under section 309(g)(6)(A)(ii) even though the State agency had initiated an enforcement action, but then settled with the discharger for (1) payment of a $1,400 penalty, (2) a stipulated order requiring a sewage treatment plant upgrade at a cost of $175,000 to $200,000, and (3) compliance with interim discharge limits during construction, in exchange for foregoing further penalties. *Knee Deep Cattle Co.* v. *Bindana Inv. Co., Ltd.*, 94 F.3d 514, 515 (9th Cir. 1996). The Ninth Circuit overturned a well-reasoned district court decision applauding the State agency for acting "to eliminate pollution through a settlement agreement" under which "defendants are building a new sewage treatment plant." *Knee Deep Cattle Co.* v. *Bindana Investments Co.*, 904 F.Supp. 1177, 1183 (D. Or. 1995). Applying its decision in this case, the Ninth Circuit held that, despite the settlement and order, the Oregon agency was not diligently prosecuting an action for penalties under a state law comparable to section 309(g). *Knee Deep*, 94 F.3d at 516-517. Allowing such a duplicative and unnecessary citizen suit that alleges the same violations resolved by state administrative enforcement contravenes this Court's teaching in *Gwaltney*.

Until the issues presented by this case are resolved nationally by this Court, companies and municipalities with NPDES permits in the First and Eighth Circuits will be treated differently and able to operate with more certainty — the certainty to which they are entitled — than those in the Ninth Circuit. Those in other circuits will remain in limbo as to which standards may apply in their jurisdiction: (1) the view of the Ninth Circuit that allows citizen suits to second-guess state action, or (2) the views of the First and Eighth Circuits that, consistent with *Gwaltney*, preclude unnecessary and duplicative citizen suits where the state has taken enforcement action. This uncertainty is bound to disrupt and complicate state regulatory efforts and needlessly burden federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 13, 1996

APPENDIX A

CITIZENS FOR A BETTER ENVIRONMENT CALIFORNIA, San Francisco Baykeeper, Save San Francisco Bay Association, The Bay Institute of San Francisco, Santa Clara Valley Audubon Society, Kalon Wofford and Anthony Willis, Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Appellant.

No. 95-15139.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 8, 1996.

Decided May 13, 1996.

As Amended July 16, 1996.

Before: BROWNING and JOHN T. NOONAN, Jr., Circuit Judges, and MERHIGE, Senior District Judge.*

MERHIGE, Senior District Judge:

This case arises under the federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251, *et seq.* The Appellees, Citizens for a Better Environment, et al. ("CBE"), brought this action in the federal district court for the Northern District of California pursuant to the citizen suit provision of that Act, 33 U.S.C. § 1365. In the Complaint, CBE asserted a claim for violations of the Clean Water Act effluent standards, a claim for violations of Clean Water Act water quality standards, and a state law claim. Although the

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

district court granted the motion of the Appellant, Union Oil Company of California ("UNOCAL"), to dismiss as to the water quality standards claim, the district court denied UNOCAL's motion to dismiss, premised on 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii), as to the effluent standards claim and the dependent state law claim. The district court certified its order denying UNOCAL's motion to dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b).

I.

The Clean Water Act regulates the discharge of pollutants into navigable waters. The Act prohibits all discharge of pollutants except inasmuch as one of several enumerated statutory exceptions applies. 33 U.S.C. § 1311(a). One such exception is where the polluter has been issued a National Pollution Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the prohibition in § 1311(a). Authority to administer the NPDES permit system may be delegated to a state or regional agency where the state or regional regulatory scheme meets certain criteria. 33 U.S.C. § 1342(b). The entity responsible for issuing permits in the San Francisco Bay area of California is the California Regional Water Quality Control Board, San Francisco Region (the "Regional Board"). Private citizens may bring suit pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

UNOCAL owns and operates a petroleum refinery in the San Francisco Bay area of California. Wastewater from the refinery is subject to UNOCAL's NPDES permit issued by the Regional Board. On February 20, 1991 the Regional Board issued Order No. 91-026, which amended the UNOCAL's NPDES permit for the San Francisco Bay area refinery. The order set a "final" concentration limit on selenium discharges of 50 parts per billion ("ppb") and a

mass emission rate of .85 pounds per day, calculated on a running annual average. The final selenium limitation was to take effect December 12, 1993. On June 16, 1991 the Regional Board issued Order No. 91-099 amending UNOCAL's NPDES permit to include an "interim limit" less stringent than the final limit which took effect immediately and which was to remain in force until the final limit came into effect. UNOCAL is in substantial compliance with the interim limit but is not in compliance with the final limit.

The Regional Board issued these orders pursuant to 33 U.S.C. § 1314(*l*) of the Clean Water Act, which required the Regional Board to adopt individual control strategies for discharges into waters determined by the United States Environmental Protection Agency ("EPA") or the state to be impaired. The Regional Board listed San Francisco Bay as a "hot spot" under § 1314(*l*) on the ground that it failed to meet the "applicable water quality standard" of the Clean Water Act "due entirely or substantially to discharges from point sources of any toxic pollutants." *See* 33 U.S.C. § 1314(*l*)(1)(B).

The state water board denied an appeal by UNOCAL and other refiners challenging the selenium discharge limits. Shortly thereafter, on October 12, 1992, UNOCAL and others filed a petition for a writ of mandate in the Solano County Superior Court of California seeking to set aside the interim and final limits on the grounds that the Regional Board's listing of the San Francisco Bay as a "hot spot" violated the Clean Water Act and its implementing regulations.

Over the course of 1993, UNOCAL and others were in settlement discussions with the Regional Board. Although other refiners in the area became able to meet the final limits, UNOCAL and other refiners maintained their inability, due to technological constraints, to meet the final selenium limits. On November 8, 1993, UNOCAL, along with other refiners, reached a settlement agreement whereby UNOCAL and others

would dismiss the state lawsuit and the Regional Board would adopt a proposed cease and desist order ("CDO"). The parties dispute whether the settlement agreement and proposed CDO were released for public comment on November 9, 1993 or November 12, 1993. On November 19, 1993 and December 15, 1993 public hearings were held on the proposed CDO at which CBE participated. The Regional Board, with some minor modifications, issued the CDO on January 19, 1994 as Order No. 94-015.

The principal elements of the settlement agreement and the CDO were that UNOCAL and the other refiners dismissed their state court lawsuit without prejudice, UNOCAL and others paid the state a total of $2 million ($780,000 of which was contributed by UNOCAL), and the Regional Board issued the CDO which, among other things, relieves UNOCAL and others from meeting the final selenium limit until July 31, 1998. The CDO states, with respect to the latter element, that:

> Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> ....
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CBE filed this lawsuit on March 2, 1994. On July 8, 1994, the district court dismissed the water quality standards claim. The district court subsequently certified the question of its denial of the motions to dismiss as to the other claims for immediate appeal pursuant to 28 U.S.C. § 1292(b).

II.

UNOCAL asserts two arguments as to why dismissal of the effluent standards claim is proper. First, UNOCAL argues that dismissal is warranted because the citizen suit is barred under § 1319(g)(6)(A)(ii) and § 1319(g)(6)(A)(iii). Second,—UNOCAL urges that dismissal for failure to state a claim is appropriate because the CDO issued by the Regional Board had the effect of extending until 1998 the deadline for complying with the final selenium limits specified in the NPDES permit and, thus, there is no effluent standards violation. The Court reviews each of these questions of law de novo. *Kruso* v. *International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

A. Is the Citizen Suit Barred Under 33 U.S.C. § 1319(g)(6)(A)(ii) or § 1319(g)(6)(A)(iii)?

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act. 33 U.S.C. § 1319(g)(6) sets out certain instances where these citizen suits are barred. The provisions of § 1319(g)(6)(A) are precisely designed to preclude citizen suits which would be duplicative of an "administrative penalty action." *See Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993).

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, provides, in relevant part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> > (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation....

> The district courts shall have jurisdiction ... to enforce such an effluent standard or limitation, or such an order, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a).

Section 1319(g)(6) provides, in relevant part:

> [A]ny violation—
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under this subsection,
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> >
> > (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6)(A).

1. Applicability of § 1319(g)(6)(A)(iii)

§ 1319(g)(6)(A)(iii) precludes this citizen suit if the CDO at issue in this case is a "final order not subject to further judicial review," and if UNOCAL has paid a "penalty" that was "assessed under this subsection, or such comparable State law." Because UNOCAL has not paid a "penalty" "assessed under ... comparable State law" the Court concludes that CBE's suit is not barred by § 1319(g)(6)(A)(iii).

a. "penalty"

UNOCAL maintains that the $780,000 it paid to the Regional Board constituted a "penalty" within the meaning of § 1319(g)(6)(A)(iii). The district court concluded that the $2 million payment, of which UNOCAL's payment was a part, was not a penalty but "was simply settling the refineries' state court lawsuit." The district court noted that the CDO refers to a "payment" not a "penalty" and that the CDO clearly stated that it was issued pursuant to the Regional Board's authority under California Water Code § 13301, governing cease and desist orders. The district court also noted that in the CDO the Regional Board "expressly declined to invoke its [California Water Code] § 13385 authority" to impose a civil penalty.[1]

UNOCAL argues, essentially, that it has paid out over $780,000 (10% of which went into the California Water Pollution Cleanup and Abatement Account that is the repository of fines levied pursuant to § 13385, and 90% into

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[1] The CDO states, in part, that:

> [t]he Regional Board has considered the various enforcement and penalty options available to it regarding the violation [of the NPDES permit], including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

a "Selenium Mitigation Fund")[2] and that it elevates form over substance to call this anything other than a "penalty."

In support of the formal reasoning of the district court, CBE asserts two additional reasons why UNOCAL may not characterize the payment as a penalty. First, UNOCAL itself insisted on characterizing the financial transfer as a "payment" and not a "penalty" at the time of the state action settlement. CBE notes that counsel for UNOCAL stated at the hearing on the motion to dismiss at the district court that UNOCAL would not, at the time of the settlement of the state lawsuit, "sign on to paperwork that characterized it as a penalty, because of the punitive and bad conduct implications that the general public takes from that term." CBE, appropriately, in the Court's view, argues that UNOCAL simply "cannot have it both ways" and that the fairest characterization of the $780,000 payment is that it was not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action.

Second, CBE argues that there are other significant advantages that were obtained by UNOCAL by making a payment independent of the state statutory provision, California Water Act § 13385, that is analogous to the administrative penalty provision of the Clean Water Act, 33 U.S.C. § 1319(g). California Water Code § 13385 sets out formal procedures to be followed and specific factors to be considered in setting a penalty. Thus, asserts CBE, by making a payment outside the context of § 13385, UNOCAL avoided a significant level of scrutiny as to the nature and amount of a penalty. For example, the United States, as *amicus curiae*, notes that there was no formal scrutiny of the economic benefits to UNOCAL of non-compliance and thus

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[2] The Appellees argue, however, that this cuts against the Appellant because § 13385 requires all penalties to be paid into the California Water Pollution Cleanup and Abatement Account.

no assurance that UNOCAL has fully disgorged the benefit it receives from violating effluent standards. CBE also notes that while payment of an administrative penalty must be made within 30 days of being imposed, California Water Code § 13323(d), UNOCAL was not required to make half of its payment until a year after the settlement was entered into.

The Court determines that the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board. Accordingly, because UNOCAL has not paid a "penalty," the § 1319(g)(6)(A)(iii) bar to citizen suits does not apply. This conclusion that § 1319(g)(6)(A)(iii) is not implicated is buttressed by the Court's interpretation of the term "comparable state law," discussed below.

b. "comparable state law"

Having determined that the payment at issue was not a "penalty," the district court also concluded that the payment was not "assessed under this subsection, or such comparable State law" within the meaning of § 1319(g)(6)(A)(iii). It is undisputed that the penalty provision in § 13385 of the California Water Code is comparable to the federal Clean Water Act penalty provision of 33 U.S.C. § 1319. It is also not disputed that the payment at issue in this case was not levied pursuant to California Water Code § 13385.[3] The key issue, therefore, is whether a penalty assessed not in accordance with § 13385 but, instead, under the aegis of a related provision of the California statutory scheme is "assessed under this subsection, or such comparable State law." UNOCAL argues, as it did in the district court, that although the CDO states that it was issued under the authority

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[3] Although the parties dispute the degree of similarity to the requirements of § 13385 of the procedures and factors that were actually taken and considered in this case, Appellant cedes that the specific requirements of § 13385 were not adhered to.

of California Water Code § 13301, because § 13301 is within the same statutory scheme as § 13385 a penalty assessed under the former provision is assessed under a "comparable State law" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

The district court held that the "comparability assessment is conducted by examining the state statutory enforcement provision involved," here California Water Code § 13301, and "not the state statutory enforcement scheme as a whole." Because California Water Code § 13301 is not comparable to the federal penalty provision in 33 U.S.C. § 1319(g), reasoned the district court, a penalty assessed under § 13301 does not implicate the § 1319(g)(6)(A)(iii) bar on citizen suits. In reaching this conclusion the district court specifically rejected the reasoning of the First Circuit in *North and South Rivers Watershed Ass'n* v. *Scituate* interpreting the term "comparable" in § 1319(g)(6)(A)(ii). 949 F.2d 552, 555-556 (1st Cir. 1991).

In *Scituate* the First Circuit held that the comparability requirement of § 1319(g)(6)(A)(ii) is met where the state "statutory scheme" contains a penalty provision comparable to the federal penalty provision and that a state's decision not to utilize the comparable state law penalty provision in any particular case does not negate the "comparability" of the state action. *Id.*; accord, *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 382-383 (8th Cir. 1994). The *Scituate* Court reasoned:

> The State's decision not to utilize the penalty provisions does not alter the comparability of the State Act's statutory scheme to the scheme found in the Federal Act. While the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision, another section of the same statute does contain penalty provisions. These two coordinate parts are cogs in the same statutory scheme implemented by the State for the protection of its waterways.

Scituate, 949 F.2d at 556, (internal citations omitted). Thus, "[i]t is enough that the [state] statutory scheme ... contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* Furthermore, according to the *Scituate* Court, "[s]o long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act." *Id.*

In *Washington Public Interest Research Group* v. *Pendleton Woolen Mills* this Court interpreted the terms of 33 U.S.C. § 1319(g)(6)(A)(i). 11 F.3d 883 (9th Cir.1993). The Court noted that § 1319(g) deals only with administrative penalty actions. *Id.* at 885. The Court then concluded that when determining whether the EPA was "diligently prosecuting an action under this subsection," the phrase "under this subsection" could mean only that the EPA was prosecuting an administrative penalty action. *Id.* at 886. The § 1319(g)(6)(A)(i) bar to citizen suits, therefore, was not implicated "in the face of an administrative compliance order." *Id.* The Court specifically noted that it was not persuaded by the reasoning underlying the *Scituate* Court's interpretation of § 1319(g)(6)(A)(ii) which was grounded in that court's concern that the discretion of enforcement authorities to choose enforcement methods be preserved. *Id.* This Court noted the language of the statute was clear and that there was no evidence in the legislative history that suggested that Congress intended to extend the bar on citizen suits to a context beyond administrative penalty actions. *Id.* at 885-886. This Court also noted that had Congress intended that administrative compliance orders preclude citizen suits, it could have done so—as it has in other instances. *Id.* at 886.

The Court concludes that the requirement in § 1319(g)(6)(A)(iii) that any penalty be "assessed under this subsection, or such comparable State law" before it precludes citizen suits means that the penalty at issue must have been assessed under that provision of state law that is comparable to § 1319(g). There are several reasons for this conclusion. First, this is the plainest reading of the statutory language.[4] Second, § 1319(g) mandates various public notice and comment procedures as well as penalty assessment factors. Unless any penalty is assessed according to the particular provision of state law that is comparable to § 1319(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude. Third, as noted by the United States in its amicus brief, the holding of *Scituate* leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA. Nothing in the language and structure of the § 1319(g)(6)(A) in any way suggests that Congress intended such a dichotomy. Nor has the UNOCAL pointed to any legislative history that would indicate that Congress intended that state administrative actions be given

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[4] As the Supreme Court has stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney*, 484 U.S. at 56, 108 S.Ct. at 381, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S.Ct. at 2056. "If the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

broader preclusive effect than the administrative actions of the EPA.

2. Applicability of § 1319(g)(6)(A)(ii)

§ 1319(g)(6)(A)(ii) precludes this citizen suit if the State "has commenced and is diligently prosecuting an action under a State law comparable to this subsection."

The district court concluded that the § 1319(g)(6)(A)(ii) bar was inapplicable for two reasons. First, the district court concluded that the action at issue was not taken "under a State law comparable to this subsection." Additionally, the district court concluded that "because of the entry of the settlement agreement and the CDO, the Regional Board's enforcement action is no longer still being 'prosecuted' within the meaning of § 1319(g)(6)(A)(ii)."

UNOCAL has made no contention in its briefs as to why the district court erred in concluding that the action was no longer being "prosecuted" within the meaning of § 1319(g)(6)(A)(ii).[5] It seems plain that no action *is* being prosecuted at this time. Thus, § 1319(g)(6)(A)(ii) is inapplicable. Furthermore, the Court concludes, for the reasons discussed above with respect to § 1319(g)(6)(A)(ii), that the district court did not err in concluding that the Regional Board's action was not taken "under a State law comparable to this subsection."

B. Did the Regional Board's Cease and Desist Order Effectively Defer the Compliance Date for Selenium Discharges so that UNOCAL is not "in Violation" of an Effluent Standard or Limitation?

UNOCAL asserts that CBE has failed to state a claim because the facts it alleges do not constitute a "violation of an

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[5] Indeed, the Appellant raised this provision in the district court only in a footnote of its briefs and it was dealt with by the district court in a footnote to its decision.

effluent standard or limitation" within the meaning of § 1365(a)(1)(A) because the CDO issued by the Regional Board had the effect of modifying UNOCAL's NPDES permit to extend until 1998 the deadline for complying with the final selenium limit.

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act.[6] "Effluent standard or limitation" means "an effluent limitation or other limitation under section 1311" or "a permit or conditions thereof issued under section 1342 [the NPDES provision] of this title." 33 U.S.C. § 1365(f). Thus, violation of the limits specified in an NPDES permit is a violation of "an effluent standard or limitation" within the meaning of § 1365.

The district court concluded that the issuance by the Regional Board of the CDO extending the compliance schedule was akin to an exercise of prosecutorial discretion and did not suspend the limits and deadlines contained in the NPDES permit or shield UNOCAL from this citizen suit. While UNOCAL concedes that the CDO did not purport to modify the NPDES permit and did not constitute a formal

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[6] Section 1365 provides, in part, that:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> > (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation....

33 U.S.C. § 1365.

amendment or modification of the NPDES permit,[7] it argues that the CDO did have the practical effect of modifying the compliance date contained in the NPDES permit. For the first time on appeal, UNOCAL also argues that the district court was foreclosed, under either the doctrine of exhaustion of remedies or the doctrine of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), from addressing the argument that the CDO issued by the Regional Board failed to effectively modify the NPDES compliance date because California law provided CBE a right, of which they did not avail themselves, to review of the CDO by appeal to the state water board or by judicial review in state court. California Water Code §§ 13320, 13330.

The Court concludes that the federal courts are not precluded from addressing the issue of whether the CDO effectively modified the NPDES compliance date. While it is true that there, were procedures available for CBE to appeal the CDO within the state system, this action does not challenge the validity of the CDO but rather seeks to enforce the requirements of the Clean Water Act. Furthermore, 33 U.S.C. § 1365 makes no mention of exhaustion of state remedies as a prerequisite for bringing a citizen suit. Similarly, *Younger* abstention is not appropriate. There are three requirements for the invocation of *Younger*—ongoing state proceedings, implication of an important state interest in the state proceedings, and an adequate opportunity to raise federal questions in the proceedings. *World Famous Drinking Emporium* v. *City of Tempe*, 820 F.2d 1079 (9th Cir. 1987). While failure to exhaust state appellate remedies may satisfy the requirement that there be ongoing state proceedings, *Id.*,

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[7] There are specific, mandatory procedure for NPDES permit modification. Cal. Code Regs. Tit. 23, § 2235; 40 C.F.R. § 122.62. *See also Ackels* v. *U.S.E.P.A.*, 7 F.3d 862, 864, n.1 (9th Cir. 1993). It is undisputed that these procedures were not followed in this case.

the doctrine is simply not relevant where the federal action is not seeking a ruling on the validity of the state action.

The Court further concludes that the CDO at issue did not modify, effectively or otherwise, the terms of UNOCAL's NPDES permit. This conclusion is appropriate for the following reasons.

First, the CDO does not purport to modify the NPDES permit. In the Findings to the CDO, the Regional Board states in paragraph 4 that "[t]he effluent limitations imposed under Order No. 91-026 [amending the NPDES permit to include the final selenium limits] become effective on December 12, 1993.... The Regional Board is adopting this Order to enforce the provisions of Order No. 91-026." Thus, the Regional Board did not intend to modify the Permit but instead worked out a compliance schedule wherein, according to paragraph 7 of the CDO, if "the dischargers have failed to comply with the provisions of this Order [the official may ...] request the Attorney General to take appropriate action against the dischargers, including injunctive and civil remedies, if appropriate, or to issue a Complaint for Board consideration of Administrative Civil Liabilities." Thus, the language of the CDO itself fits with the conclusion that the CDO was an exercise of prosecutorial discretion.

Second, as noted above, federal and state regulations govern the modification of NPDES permits. It is not disputed that these regulations were not followed in this case. These regulations, both procedural and substantive, ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities. For instance, there are public notice requirements for a permit modification process that are different than those required in an enforcement action. Further, there is a five year duration on the life of an NPDES permit that the "effective modification" asserted here would violate. § 1342(b)(1)(B).

Third, even if the CDO were to be construed as having effectively extended the compliance date in the NPDES permit, such a modification would likely run afoul of the substantive constraint on the ability of regulators to modify permits found in 33 U.S.C. § 1342(o) (the "anti-backsliding" provision). This provision prohibits, with certain narrow exceptions,[8] any modified permit from containing "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." UNOCAL asserts that the "effective" modification of the permit under consideration would not violate the anti-backsliding provision because the permit contained interim limits which would remain in full effect until the final limits actually took effect. Essentially, argues UNOCAL, the final limits have never taken effect so they cannot be backslided on. This argument seems to assume that effluent standards are not effectively part of the NPDES permit until they take effect. It appears to the Court, however, that a modified NPDES permit that does not contain a strict effluent limitation that had been about to come into effect is, indeed, "less stringent" than the previous, unmodified NPDES permit—regardless of whether the limitation had yet taken effect.

III.

For the foregoing reasons, the district court's denial of UNOCAL's motion to dismiss is **AFFIRMED**.

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[8] Appellant has asserted that two such exceptions are applicable. Appellant asserts that "new information is available" that "would have justified" a less stringent standard under § 1342(o)(2)(B)(i) and that there is no "reasonably available remedy" under § 1342(o)(2)(C). Because it is not necessary so to do, the Court does not comment on the applicability of these exceptions.

APPENDIX B

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

UNION OIL COMPANY OF CALIFORNIA, Defendant.

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

EXXON COMPANY USA, Defendant.

Nos. C 94-0712 TEH, C 94-0713 TEH.

United States District Court, N.D. California.

July 8, 1994.

MEMORANDUM OPINION AND ORDER

THELTON E. HENDERSON, Chief Judge.

The two above-captioned related cases are identical citizen suits brought by non-governmental environmental conservation organizations against defendant oil companies. The suits challenge each defendant's discharge into portions of the San Francisco Bay of waste water containing the chemical selenium from oil refineries owned by each defendant located in the San Francisco Bay area. The first suit is brought against defendant Union Oil Company of California ("Unocal") and concerns Unocal's refinery at Rodeo, California, which discharges waste water containing selenium into the San Pablo Bay. The second is against the Exxon Corporation ("Exxon") and concerns Exxon's refinery at Benicia, California, which discharges selenium into Suisan Bay. Plaintiffs allege that the selenium levels in the effluent

discharged from Unocal and Exxon's refineries violate the federal Water Pollution Control Act ("Clean Water Act" or "Act"), 33 U.S.C. § 1251 *et seq.*

Defendants Unocal and Exxon have moved to dismiss the suits on several grounds. In addition, Exxon has moved that the suit against it be dismissed on the ground that venue over that case properly lies in the U.S. District Court for the Eastern District of California. Oral argument on these motions was heard by the Court on June 6, 1994. After consideration of the parties' written and oral arguments, the Court rules that venue in the suit against Exxon, *Citizens for a Better Environment-California* v. *Exxon*, No. C 94-0713 TEH, indeed lies in the Eastern District and therefore ORDERS that the case be TRANSFERRED from this Court to the U.S. District Court for the Eastern District of California. As for the suit against Unocal, the Court DENIES Unocal's motion to dismiss. The reasons for these rulings are set forth in the memorandum opinion and order that follows.

I. BACKGROUND

In these two actions brought pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, the plaintiff environmental groups seek to enforce effluent discharge standards and deadlines contained in certain pollution permits issued to defendants Unocal and Exxon pursuant to the Clean Water Act. These suits are undertaken in the face of an administrative order, issued by a state agency charged with enforcing the Clean Water Act, which purports to grant defendants a five-year extension of the deadline by which they must come into compliance with the pollution discharge standards contained in their permits. The issue central to these motions is what effect the state administrative order has on the enforceability of the standards contained in defendants' pollution permits.

A. THE REGULATORY FRAME-WORK

The Clean Water Act regulates the discharge of pollutants into navigable waters. The statute is structured such that all discharge of pollutants is prohibited except insofar as one of several enumerated statutory exceptions applies. *See* 33 U.S.C. § 1311(a). One such exception obtains where a polluter has been issued a permit pursuant to the National Pollution Discharge Elimination System ("NPDES permit" or "permit"), authorizing it to discharge designated pollutants at certain levels subject to certain conditions. *See* 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33 U.S.C. § 1311(a). Private parties may bring citizen suits pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

The Act provides that, in any given state or region, authority to administer the NPDES permitting system can be delegated by the federal Environmental Protection Agency ("EPA") to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. *See* 33 U.S.C. § 1342(b). In California, EPA has granted authorization to a state regulatory apparatus, comprised of the State Water Resources Control Board ("State Board") and several subsidiary Regional Water Quality Control Boards, to issue NPDES permits. The entity responsible for issuing NPDES permits and otherwise regulating discharges in the region at issue in these cases is the California Regional Water Quality Control Board, San Francisco Region ("Regional Board" or "Board").

B. HISTORY OF UNOCAL AND EXXON'S NPDES PERMITS

Exercising its delegated authority under the Clean Water Act, the Regional Board in 1989 and 1990 issued NPDES permits for Unocal, Exxon, and four other Bay Area oil refineries, specifying certain limits on the amount of pollutants that the refineries could discharge into the San Francisco Bay and its estuary ("Bay"). Selenium, a toxic element, occurs in high concentrations in the relatively low grade crude oil from the San Joaquin Valley that is refined at the six Bay Area refineries. Selenium passes through the refineries and is present in the wastes that they discharge into the Bay.

The 1987 Amendments to the Clean Water Act required states to identify a list of navigable waters for which water quality standards established under the Act were unlikely to be achieved "due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to [33 U.S.C. § 1317(a)]." 33 U.S.C. § 1314(*l*)(1)(B). Selenium has been listed by EPA as a toxic pollutant pursuant to this code section. *See* 40 C.F.R. § 401.15. As part of such listing, the state must identify the point sources causing selenium pollution in the listed waters and develop an "individual control strategy" ("ICS") to control each point source so as to achieve the water quality objectives for such waters "as soon as possible, but not later than 3 years after the date of the establishment of such strategy." 33 U.S.C. §§ 1314(*l*)(1)(C), (D).

On February 3, 1989, when the California Water Resources Control Board published its list required pursuant to the 1987 Clean Water Act Amendments, the State Board did not identify several portions of the upper San Francisco Bay Estuary—San Pablo Bay, Carquinez Strait, and Suisan Bay—as "toxic hot spots" for selenium, nor did it specify oil refinery selenium discharges as a substantial cause of selenium pollution in the Bay. EPA took issue with these

omissions, among other things. Exercising its regulatory authority under the Clean Water Act, EPA issued a final listing on September 28, 1990, designating these portions of the Bay as "impaired waters" due to selenium pollution, and attributing that selenium substantially to the discharges from the six Bay Area refineries: Unocal's refinery in Rodeo, Exxon's refinery in Benicia, Shell Oil Company's manufacturing complex in Martinez, Tosco Corporation's refinery in Avon, Chevron U.S.A.'s refinery in Richmond, and Pacific Refining Company's facility in Hercules. EPA stated that it disapproved of the ICS's then in effect for Unocal, Exxon, and the other dischargers, and made known its intention to issue its own ICS's not later than December 31, 1990, which would require compliance with specified effluent limits, calculated based on state water quality standards, within three years of the date of issuance.

Responding to EPA's rebuke, on February 20, 1991, the Board issued an order listing San Pablo Bay, Carquinez Strait, and Suisan Bay as "hot spots" under 33 U.S.C. § 1314(*l*), and amending Unocal, Exxon, and the other refineries' NPDES permits to specify certain concentration- and mass-based limits on the amount of selenium that each refinery could discharge. By the terms of the amended permits, these new limits ("final limits") would become effective on December 12, 1993. On June 16, 1991, the Board issued an additional order, amending the permits of Unocal, Exxon, and the other refineries to include interim selenium discharge limits ("interim limits"), significantly less stringent than the final limits. The interim limits went into effect immediately on that date and were to remain in force until the final limits took effect.

C. STATE COURT LAWSUIT BY REFINERIES

Unocal, Exxon, and the other Bay Area refineries sought unsuccessfully to challenge the Regional Board's listing of San Pablo Bay, Carquinez Strait, and Suisan Bay as impaired waters, each filing applications for review with the State

Water Resources Control Board. On October 16, 1992, shortly after those applications were dismissed by the State Board, the Bay Area refineries and their trade association, the Western States Petroleum Association ("WSPA"), filed a petition for writ of mandate in Solano County Superior Court seeking to set aside the Regional Board's orders imposing the final limits and the interim limits on the ground that the listing of the above-noted regions of the Bay as impaired bodies of water was in violation of various provisions of the Clean Water Act and of EPA administrative regulations promulgated under the Act.

D. SETTLEMENT OF LAWSUIT AND REGIONAL BOARD ENFORCEMENT ACTION

The refineries and WSPA did not press for a hearing on the merits of their state court suit but instead initiated settlement negotiations with the Regional Board and the California Attorney General's Office, which proceeded over the course of 1993. Three of the Bay Area refineries, Chevron, Tosco, and Pacific Refining, reduced their discharge levels, such that they would be in compliance with the final limits when they took effect. Unocal, Exxon, and Shell, however, contended that they could not comply with the final limits. Although the other three refineries had succeeded in reducing their effluent levels to meet the final limits, Unocal, Exxon, and Shell maintained that, due to technological constraints, they could not reduce their selenium discharge levels sufficiently to comply with the final limits scheduled to take effect on December 12, 1993.

On November 8, 1993, the six refineries, the state, and the Regional Board agreed on a settlement pursuant to which the refineries and WSPA would consent to dismissal of their state court action, and the Board would issue a Cease and Desist Order ("CDO"). The Board published the proposed settlement and CDO in the days that followed, and noticed public hearings on them.

The principal terms of the settlement were that the three refineries that had not complied with their final selenium limits—Unocal, Exxon, and Shell—would receive a nearly five year extension until July 31, 1998 of their deadline for complying with their final limits, and in exchange would pay the state $2 million and, along with the other refineries, would drop their state court action. Oddly, however, neither the settlement agreement nor the CDO expressly state that Unocal, Exxon, and Shell are relieved from having to comply with the final limits contained in their NPDES permits until July 31, 1998. Rather, the CDO effects this purported extension by providing that Unocal, Exxon, and Shell

> shall cease and desist from discharging waste in violation of [their NPDES permits] by complying with the following:
>
> * * * * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> * * * * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CDO at 7. The settlement agreement stated that the above-quoted provision of the CDO "effectively modified" the deadlines specified in defendants' NPDES permits for complying with the final selenium limits. The CDO also provided that Unocal, Exxon, and Shell would implement a study to identify technologies for reducing selenium discharge levels, and would carry out pilot tests and source reduction studies.

The terms of the settlement agreement dismissing the refineries' state court suit specified that the dismissal was to be "without prejudice" and expressly provided that nothing in the agreement waived the refineries' right to challenge the validity of the final limits contained in their NPDES permits. The refineries agreed only to refrain from challenging the final limits unless and until the refineries should find in 1998 that they are unable to identify or implement a workable removal technology or other control strategy that would enable them to meet the limits, and the Board declines to extend the July 31, 1998 deadline further. Thus, in effect, the refineries merely agreed to drop their challenge to the final limits so long as the limits are not being enforced, but retained the right to challenge them once they are.

On November 19, 1993, and December 15, 1993, public hearings on the CDO were held at which the instant plaintiffs and other members of the public testified. The Board made some minor modifications to the CDO in response to comments received from the public and from EPA, and issued a final CDO on January 19, 1994. Plaintiffs filed these lawsuits on March 2, 1994.

II. LEGAL STANDARD

Dismissal is appropriate under Fed. R. Civ. P. ("Rule") 12(b)(6) when a plaintiff's complaint fails to state a claim upon which relief can be granted. The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Dodd* v. *Spokane County*, 393 F.2d 330, 334 (9th Cir. 1968); *NL Industries, Inc.* v. *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Unless the Court converts the Rule 12(b)(6) motion into a motion for summary judgment, the court may not consider material outside of the complaint. *Powe* v. *City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). However, "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not

convert a Rule 12(b)(6) motion to one for summary judgment." *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Matters of public record include court and agency orders and agency regulations. *Id.* Thus, this Court may take judicial notice on this motion of rulings and regulations issued or published by the Regional Board or by EPA, regardless whether such documents were filed as attachments to the complaint.

The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears to a certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Intake Water Co.* v. *Yellowstone River Compact Comm'n*, 769 F.2d 568, 569 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S. Ct. 2288, 90 L.Ed.2d 729 (1986). However, legal issues on which the actionability of the claim depends can and should be resolved at this stage. Dismissal is appropriate if, as a consequence of such resolution, the court determines that, as a matter of law, the complaint's allegations fail to state a claim.

Dismissal is appropriate under Rule 12(b)(3) where venue in a case does not properly lie in the court in which it is filed. However, where the court deems it to be "in the interest of justice," the court may instead transfer an improperly venued case to a court in which it could have been brought. 28 U.S.C. § 1406(a).

III. DISCUSSION

In their complaints in each of these two related cases, plaintiffs allege three causes of action: that defendant has not complied with an applicable effluent standard or limitation—to wit, the final selenium limits and accompanying compliance deadline contained in their NPDES permits—in violation of the Clean Water Act, 33 U.S.C. § 1311(a); that defendant has not complied with an applicable water quality standard, also in violation of the Clean Water Act; and that defendant has

engaged in an unfair business practice in violation of California Business & Professions Code § 17200 *et seq.*

As to the first cause of action, defendants contend that the CDO issued by the Regional Board properly extended the deadline by which defendants are required to comply with the selenium discharge limits specified in their NPDES permits, such that their present failure to meet that limit does not violate the federal Clean Water Act. Alternatively, defendants argue that, in any event, plaintiffs may not bring a citizen suit to enforce the effluent standards specified in defendants' NPDES permits because the Regional Board has already taken enforcement action as to that violation and defendants have paid a penalty, thereby precluding a parallel citizen enforcement suit under 33 U.S.C. § 1319(g)(6)(A)(iii). Finally, defendants charge that plaintiffs' suits are barred for failure to satisfy the notice requirements imposed under 33 U.S.C. § 1365(b)(1)(A) for citizen suits.

As to the second cause of action, defendants urge that water quality standards—as distinct from effluent standards—are not enforceable in citizen suits under the Clean Water Act and that the count must consequently be dismissed. As for the third cause of action, defendants contend that dismissal of the first two claims necessitates dismissal of the third state law claim as well. Finally, defendant Exxon charges that the suit against it must be dismissed for improper venue since its refinery is not located within the geographic area for which venue properly lies in this Court.

A. VENUE IN *CITIZENS FOR A BETTER ENVIRONMENT V. EXXON*

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, under which plaintiffs have brought these suits, contains a special venue provision stating that

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought

> under this section *only* in the judicial district in which such source is located.

33 U.S.C. § 1365(c)(1) (emphasis added). As is clear on the face of the complaint, Exxon's refinery is located in the City of Benicia, *see* Complaint ¶ 9, which is within the County of Solano. Solano County is in the geographic region covered by the U.S. District Court for the Eastern District of California, not this Court. 28 U.S.C. § 84(b). The Eastern District is therefore the only district in which venue is proper under the Act. On this basis, Exxon urges that the Court dismiss the suit for improper venue pursuant to Rule 12(b)(1). Conceding this venue error in their opposition papers, plaintiffs urge that the Court transfer the case to the Eastern District rather than dismiss it.

28 U.S.C. § 1406(a) instructs that:

> The district court of a district in which is filed a case laying venue in the wrong ... district shall dismiss, or if it be in the interest of justice, transfer such case to any district ... in which it could have been brought.

Whether the interest of justice militates in favor of transfer rather than dismissal is a judgment committed to the sound discretion of the district court. "[T]ransfer is generally ... consistent with the 'interest of justice' ... because it eliminates the delay and additional expense associated with reinstituting suit in another forum." *Banque de la Mediterranee-France, S.A.* v. *Thergen, Inc.*, 780 F.Supp. 92, 95 (D.R.I. 1992). On the facts of this case, the Court holds that transfer rather than dismissal is appropriate. Accordingly, it is hereby ordered that *Citizens for a Better Environment-California* v. *Exxon*, No. C 94-0713 TEH, shall be TRANSFERRED FORTHWITH from this Court to the U.S. District Court for the Eastern District of California. In view of this ruling, the remainder of this opinion and order shall address only the motion to dismiss filed by the defendant in the Unocal case.

B. FIRST CAUSE OF ACTION: VIOLATION OF EFFLUENT STANDARD OR LIMITATION

Under the Clean Water Act, dischargers are strictly liable for any violation of the terms of an NPDES permit. *California Public Interest Research Group* v. *Shell*, 840 F. Supp. 712, 714 (N.D. Cal. 1993). As explained above, the Act authorizes private parties to bring citizen suit enforcement actions, and provides, in pertinent part, that such actions may be brought against

> any person ... who is alleged to be in violation of ... an effluent standard or limitation under [the Act].

33 U.S.C. § 1365. *See* 33 U.S.C. § 1365(f) (defining "effluent standard or limitation"). As noted above, the definition of "effluent standard[s] or limitation[s]" for which violations are actionable under this section includes effluent standards or limits prescribed in NPDES permits, since violation of such limits places a polluter in violation of 33 U.S.C. § 1311(a). Additionally, violations of terms contained in NPDES permits are generally enforceable of their own accord in citizen suits. *See* 33 U.S.C. § 1365(f)(6).

There is no dispute that on December 12, 1993—the date the final selenium limits took effect under Unocal's NPDES permit—and every day since then, Unocal's discharges of selenium have exceeded the daily limits under its NPDES permit. Rather, Unocal contends that plaintiffs' citizen suit should be dismissed on the grounds: (1) that the CDO issued by the Regional Board properly extended the deadline by which defendant is required to comply with the final selenium discharge limits specified in its NPDES permit, such that the deadline specified in its permit is no longer in effect; (2) that, in any event, the citizen suit is barred under 33 U.S.C. § 1319(g)(6)(A)(iii) because the state agency charged with enforcing the Act, acting pursuant to a "comparable" state law, has already issued a "final order" regarding the

violation, assessing a "penalty" against Unocal which Unocal has paid; and (3) that plaintiffs have failed to satisfy the notice requirements for a citizen suit. Each of these objections, if correct, would provide an independently adequate basis for dismissing plaintiffs' suit. Thus, in order to avoid dismissal, plaintiffs must establish that none of these objections is well-founded.

1. WHETHER, ON THE MERITS, THERE IS NO VIOLATION OF UNOCAL'S NPDES PERMIT BECAUSE THE REGIONAL BOARD'S CDO VALIDLY EXTENDED THE COMPLIANCE DEADLINE CONTAINED IN UNOCAL'S PERMIT

Unocal's first argument for dismissing plaintiffs' claim under the Clean Water Act seeking to enforce compliance with an effluent standard or limitation—plaintiffs' first cause of action—is that, on the merits, Unocal has not violated its NPDES permit because the CDO issued by the Regional Board validly extended until 1998 the deadline for complying with the final selenium limit specified in the NPDES permit.[1]

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[1] Unocal labels this argument a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), reasoning that if the NPDES limits are effectively suspended such that Unocal has not violated an effluent limit, then this Court lacks subject matter jurisdiction, for 33 U.S.C. § 1365(a) confers jurisdiction over citizen suits against polluters only where violations of effluent standards or other orders exist. However, the Supreme Court has held that, generally, assertion of a claim under a federal statute "alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the [statute] does provide the claimed rights." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959). In such cases, a finding of no statutory violation results in dismissal for failure to state

(continued...)

As recounted above, pursuant to the settlement reached by the Regional Board, the State Attorney General's Office, and the Bay Area oil refineries in late 1993, the Regional Board issued a CDO containing several terms that had been agreed to in the settlement. The CDO provided, in pertinent part:

> IT IS HEREBY ORDERED, pursuant to Section 13301 of the California Water Code, that Shell Oil Company, Union Oil Company of California, and Exxon Company, U.S.A. shall cease and desist from discharging waste in violation of Order No. 91-026 [—the order amending the refineries' NPDES permits to impose final selenium discharge limits—] by complying with the following:
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> * * * * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> * * * * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limits specified in Order No. 91-026 and shall comply with these limits, no later than July 31, 1998.

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[1] (...continued)
a claim rather than for lack of jurisdiction. The Court will therefore treat Unocal's argument here as a motion to dismiss for failure to state a claim. Ultimately, however, the label affixed to the motion is unimportant. Regardless whether dismissal on such grounds is correctly characterized as based on absence of jurisdiction or failure to state a claim, in both cases it hinges on the same legal question: whether the Board's action, as a matter of law, suspended the final limits and deadline contained in Unocal's NPDES permit.

CDO at 7.

Unocal concedes both (1) that the CDO did not purport to modify Unocal's NPDES permit, and (2) that even if it did purport to do so, such a modification would not have been valid. Any such putative modification would have been invalid for three reasons. First, modifications to NPDES permits must be implemented in accordance with standards and procedures specified in federal agency regulations which were not followed here.[2] Second, even if a purported modification had been procedurally proper, it would have

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[2] The procedures for NPDES permit modification are mandatory. Cal. Code Regs. tit. 23, § 2235; 40 C.F.R. § 123.25(a)(22); *Ackels* v. *U.S. E.P.A.*, 7 F.3d 862, 864 n.1 (9th Cir. 1993); *United States* v. *Metropolitan District Commission*, 16 Envtl. L. Rep. 20621, 20624, 1985 WL 9071 (D. Mass. 1985). Unless properly modified in accordance with these procedures, the permit as originally issued remains in effect, and violations of the permit may be subject to a citizen enforcement suit. *Public Interest Research Group* v. *Yates Industries*, 757 F.Supp. 438, 445 (D.N.J.1991); *Metropolitan District Commission*, 16 Envtl. L. Rep. at 20624, 1985 WL 9071.

First, the enforcement agency modifying the permit must make a finding of cause appropriate for modifying the permit. 40 C.F.R. §§ 122.41(f), 122.62, 122.63. The Regional Board made no such finding in this case. Second, the enforcement agency must prepare a draft permit and issue a fact sheet setting forth the significant factual, legal, methodological, and policy questions considered in preparing the draft permit, or take other mandatory steps to ensure careful assessment of alternatives. 40 C.F.R. §§ 124.6, 124.8(a), 124.10, 124.11, 124.12, 124.56. The Regional Board did not follow these procedures in this case. Furthermore, the Board's notice of hearing on the CDO makes no reference to a permit modification, further indicating that the Board did not purport to be modifying the refineries' permits.

violated a substantive requirement of the 1987 Clean Water Act Amendments which establish a three-year deadline for a polluter's coming into compliance with water quality standards imposed pursuant to 33 U.S.C. § 1314(*l*)(1)(D), such as those contained in Unocal's NPDES permit.[3] The three-year deadline for Unocal and the other refineries' permits was triggered, at the very latest, on February 20, 1991, when the Board issued its order amending the NPDES permits to include the final selenium limits. In light of that fact, any ruling purporting to extend the compliance deadline beyond February 20, 1994 would violate the statutory three-year deadline. Third, any purported modification to Unocal's permit would have violated another substantive requirement of the 1987 Clean Water Act Amendments, the "anti-backsliding" provision, which forbids permits of the type held by Unocal from being "renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," subject to certain exceptions. 33 U.S.C. § 1342(o)(1).[4]

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[3] As discussed above, 33 U.S.C. § 1314(*l*)(1)(D) requires that individual control strategies (ICS's) be adopted in order to achieve reduction in pollution levels in certain waters designated pursuant to 33 U.S.C. § 1314(*l*)(1)(D). An ICS must impose limits on toxic pollutants sufficient to attain water quality standards within three years. 33 U.S.C. § 1314(*l*)(1)(D); 40 C.F.R. § 123.46; *Westvaco Corp.* v. *U.S. E.P.A.*, 899 F.2d 1383, 1385 (4th Cir. 1990). To that end, Unocal's NPDES permit compelled it to reduce selenium discharges to meet certain limits by December 12, 1993, which was within three years of the February 20, 1991 issuance of the Board's order amending the permit to impose the final selenium limits.

[4] In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) (continued...)

Rather than contending that its permit was "modified" by the CDO, Unocal argues instead that a deadline for complying with effluent standards specified in an NPDES permit may permissibly be extended through an administrative enforcement order issued by the state agency that issued the permit. Unocal makes the novel argument that though such an enforcement action cannot "modify" a permit, an extension granted under such an order constitutes a valid authorization that has the legal effect of suspending the effect of the permit requirements such that a polluter is shielded from citizen suits seeking to enforce compliance with the permit's original deadline and limits.

It is clear that California law authorizes Regional Boards to issue CDO's that purport to grant polluters an extended time schedule within which to come into compliance with discharge limits. *See* Cal. Water Code § 13301.[5] However,

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[4] (...continued)
of the title [all concerning water quality standards], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit....

33 U.S.C. § 1342(o)(1). *See New Jersey Public Interest Research Group* v. *New Jersey Expressway Auth.*, 822 F.Supp. 174, 185 (D.N.J. 1992).

[5] When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or (continued...)

Unocal can point to no case where a federal court has held that a state enforcement action that does not satisfy the requirements to qualify as a valid "modification" of an effluent standard or limit contained in an NPDES permit, can nonetheless suspend the permit limit, shielding the polluter from having the terms of the permit enforced against it through a citizen suit.[6] Indeed, the only analogous case cited by the parties indicates the opposite. That case, *United States* v. *Bedford*, 1987 U.S.Dist. LEXIS 16103 (N.D. Ohio 1987), *adopted*, 1988 U.S. Dist. LEXIS 18612 (N.D. Ohio 1988), held that a state enforcement action that purported to suspend the terms of an NPDES permit, but which did not qualify as a valid "modification" of the permit, did not prevent the federal government from bringing a civil enforcement action in federal court pursuant to 33 U.S.C. § 1319(b) to enforce the terms of the permit. 1987 U.S. Dist. LEXIS 16103, at *10-*12. 33 U.S.C. § 1319(b) authorizes the U.S. Attorney General to bring suit to enforce compliance with, *inter alia*, effluent limits imposed under NPDES permits. Since the instant citizen suit also seeks enforcement of permit limits,[7]

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[5] (...continued)
preventative action. ....

Cal. Water Code § 13301.

[6] Again, this argument by Unocal is distinct from its separate argument that, even if the final limits contained in Unocal's NPDES permit did, in theory, take effect on December 12, 1993, and are still in force today, enforcement of those limits through a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). That separate argument is addressed by the Court later in this opinion. *See infra* Part III.B.2.

[7] 33 U.S.C. § 1319(b), the enforcement provision involved in *Bedford*, authorizes the Attorney General to sue polluters who
(continued...)

Bedford is authority for the proposition that the Regional Board's CDO did not suspend the final limits and deadline contained in Unocal's NPDES permit such that those terms may not still be enforced against it.

Unocal attempts to draw support for its position from language found in *Sierra Club* v. *Colorado Refining Co.*, 838 F.Supp. 1428, 1436 (D. Colo. 1993). However, *Colorado Refining Co.* concerned only whether a state enforcement action erected a 33 U.S.C. § 1319(g)(6)(A) preclusive bar against a citizen suit, and expressed no opinion on Unocal's instant argument. Unocal's citations to *Northwest Environmental Advocates* v. *Portland*, 11 F.3d 900, 906-11 (9th Cir. 1993), and this Court's recent opinion in the related case of *California Public Interest Research Group* v. *Shell Oil Co.*, 840 F.Supp. 712 (N.D. Cal. 1993), are similarly inapposite. *Portland*, as discussed later in this opinion, involved entirely different issues. Similarly, the language quoted from *Shell* stating that "any challenge to effluent limits in an NPDES permit presents a matter for the Water Board, not this Court, to address," 840 F.Supp. at 712, concerns just

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[7] (...continued)
violate, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. §§ 319(a), (b). As noted above, violation of effluent limits imposed under an NPDES permit places a permit-holder in violation of 33 U.S.C. § 1311(a). *See* discussion *supra* Part I.A. As also noted above, citizen suits may be brought under 33 U.S.C. § 1365 for violations of, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1). Thus, NPDES permit limits that are enforceable by the federal government under 33 U.S.C. § 1319(b) are also enforceable through citizen suits. The only exception to this proposition obtains where a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A) by a pending or final state or federal enforcement action. This separate bar to citizen suits is discussed later in the opinion. *See infra* Part III.B.2.

what it says: the circumstances under which a discharger may bring suit in federal court to *challenge* limits contained in an NPDES permit promulgated by a state enforcement agency. *Shell* in no way addresses the entirely separate issue of citizen suits to *enforce* permit limits.

In its reply papers, Unocal also cites an administrative ruling issued by the Environmental Appeals Board of EPA, *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, 1990 NPDES LEXIS 4 (April 16, 1990), as supporting their argument that a non-modification can nonetheless excuse noncompliance with an NPDES permit. The language from *Star-Kist* cited by Unocal simply states that EPA has authority, under 33 U.S.C. § 1319(a), to issue compliance orders that extend the deadlines for polluters to come into compliance with their NPDES permit requirements. That proposition is non-controversial. *Star-Kist* does not address the subtly but significantly different issue of the effect of such extensions: whether EPA compliance orders extending NPDES permit deadlines suspend the effect of the permit requirements such that polluters are shielded against citizen suits seeking to enforce compliance with the permit limits. Nor does Star-Kist address the analogous issue that is presented on this motion: whether *state* compliance orders extending NPDES permit deadlines can suspend the effect of permits such that their terms may no longer be enforced through citizen suits.

At first blush, it may not appear obvious how to assemble the different component parts of the statutory scheme at issue here into a coherent whole. First, there exist the very stringent procedures and substantive rules limiting the circumstances under which enforcement agencies may "modify" the terms of NPDES permits. Second, there exists authorization for enforcement agencies to bring civil penalty actions, *see* 33 U.S.C. § 1319(g), pursuant to which compliance schedules may, *de facto*, be extended, since such actions preclude citizen suits to enforce the NPDES permits.

See 33 U.S.C. § 1319(g)(6)(A)(iii).[8] Third, there exists authorization for enforcement agencies to bring non-penalty civil compliance actions, *see* 33 U.S.C. § 1319(a),[9] pursuant to which compliance schedules may be extended, *Star-Kist*, 1990 NPDES LEXIS 4, at *21, but which nonetheless do *not* bar citizen suits to enforce the terms of the original NPDES permits. *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

The element of the scheme the role of which may at first appear difficult to reconcile is the non-penalty civil compliance action. On the one hand, it is clear that such actions cannot amend NPDES permits to postpone compliance deadlines, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and do not trigger the statutory preclusive bar against citizen suit enforcement of limits contained in NPDES permits. *Pendleton*, 11 F.3d 883. On the other hand, however, it is also clear that EPA *can* authorize extended compliance schedules in the course of such compliance actions, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and that Regional Water Quality Control Boards can do the same under California law. Cal. Water Code § 13301. If such extended compliance schedules do not suspend the effect of limits and deadlines contained in NPDES permits such that the permit terms may

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[8] Although 33 U.S.C. § 1319(g) authorizes only *federal* civil penalty actions brought by EPA, 33 U.S.C. § 1319(g)(6)(A)(iii) provides that penalty actions brought by *state* agencies under comparable state laws trigger the same preclusive bar against citizen suits to enforce NPDES permits.

[9] Although 33 U.S.C. § 1319(a) authorizes only *federal* non-penalty civil compliance actions brought by EPA, as noted above, California Water Code § 13301 authorizes regional water boards to bring non-penalty civil compliance actions pursuant to which a revised compliance time-tables may be established. *See supra* note 5.

still be enforced against the polluter through citizen suits, then what good are compliance actions and what meaning do their extended timetables have? The answer to this question is that such orders constitute agreements by the issuing enforcement authority on how the authority—be it EPA or a state agency—plans to exercise its prosecutorial discretion. Given that such authorities are vested with enforcement powers broader in some respects than those conferred on private citizens under the citizen suit provision, and that in the vast majority of cases there exists no serious threat of citizen suit enforcement, assurances regarding authorities' intended exercise of their enforcement discretion carry great real-world significance. *See Shell*, 840 F.Supp. at 716-17 (construing language in NPDES permit as an assurance as to how the Regional Board intended to exercise its prosecutorial discretion, and not as a term modifying and weakening the permit's effluent limit). Thus, even if they cannot shield polluters from citizen suits brought to enforce the terms of NPDES permits, such actions still serve a meaningful role in the Clean Water Act enforcement scheme.

With this tension resolved, the Court concludes that, when viewed as a whole, the structure of the Clean Water Act clearly evidences a legislative intent on the part of its drafters that disfavors the interpretation urged by Unocal regarding the effect of deadline extensions contained in administrative compliance orders. As explained above, the statute imposes a variety of stringent conditions before administrative actions can modify the terms of NPDES permits. Moreover, as discussed in the next section, the statute also expressly provides that citizen suits are barred only in circumstances where certain specified types of agency enforcement actions have been taken by state or federal enforcement agencies. Unocal, in effect, contends that administrative extensions of permit deadlines can bar citizen suits to enforce permits even where the extensions neither (1) qualify as "modifications," nor (2) satisfy the requirements of

the provision that expressly bars citizen suits in some circumstances. Recognition of such an unenumerated category of administrative extension would render superfluous the very specific requirements established by Congress for permit modifications and preclusion of citizen suits. The canon of statutory construction strongly disfavors such interpretations that do not accord meaning to every word and provision in a statute, or to statutory distinctions drawn by Congress. *See United States* v. *Nordic Village, Inc.*, ---- U.S. ----, ----, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992) ("[It is a] settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect."); *In the Matter of Greystone III Joint Venture*, 948 F.2d 134, 138-39 (5th Cir. 1991) (interpretation of one statutory provision so as to render another provision superfluous "is anathema to elementary principles of statutory construction"). By writing these provisions out of the statute, Unocal's construction would create an enormous loophole, elevating civil compliance orders to the status of *de facto* modifications, thereby allowing dischargers to achieve, in effect, modifications that would otherwise be illegal under the Act. The existence of these specific provisions in the statute creates a strong inference that Congress did not intend to authorize unenumerated exceptions of the sort urged by Unocal.[10]

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[10] Additional support for this conclusion can be inferred from *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). In *Pendleton*, the EPA issued an administrative compliance order to a polluter that had violated the discharge limits specified in its NPDES permit. The EPA order set an extended compliance schedule, and ordered the polluter to make certain identified physical improvements deemed to be necessary to bring about compliance, and threatened sanctions if the polluter did not comply with the terms of the compliance order. Subsequently, an environmental group

(continued...)

In light of the above, the Court holds that, as a matter of law, an administrative enforcement action by a state agency charged with enforcing the Clean Water Act that purports to extend a deadline specified in an NPDES permit for complying with the permit's discharge limits does not serve to suspend the permit's deadlines such that they may not be enforced through a citizen suit. Such an extension, unless it satisfies the requirements to qualify as a "modification," is simply a statement by the agency as to how it plans to

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[10] (...continued)
filed a citizen suit seeking, *inter alia*, an injunction requiring immediate compliance with the discharge limits specified in the permit. The Ninth Circuit held that because the type of enforcement action that EPA had taken was not an administrative penalty action under 33 U.S.C. § 1319(g) but rather an administrative compliance action under 33 U.S.C. § 1319(a), a citizen suit could still be maintained to enforce the limits and deadlines contained in the original permit. (As noted above and discussed below, penalty actions can trigger the 33 U.S.C. § 1319(g)(6)(A) preclusive bar against citizen suits.)

The *Pendleton* defendant apparently did not expressly raise the argument made by Unocal that the administrative order extending the compliance deadline suspended the effect of the permit deadline such that it was not enforceable through a citizen suit. However, in reversing, the Ninth Circuit implicitly rejected this argument, for the argument would have afforded an alternative basis for affirming the district court's dismissal, and the court of appeals will normally affirm so long as there exists any alternative ground, fairly supported in the record, that would justify the district court's ruling. *Golden Nugget, Inc.* v. *American Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987) (affirmance on alternative ground appropriate where the record adequately establishes material facts and issues are purely legal). Thus, the *Pendleton* holding supports an inference that the Ninth Circuit was not persuaded by Unocal's argument.

exercise its prosecutorial discretion. Unocal's motion to dismiss plaintiffs' first cause of action on this ground is therefore DENIED.

2. WHETHER A CITIZEN SUIT IS PRECLUDED UNDER THE 33 U.S.C. § 1319(g)(6)(A)(iii) BAR

As noted above, the Clean Water Act expressly provides that citizen suits are barred in circumstances where certain categories of agency enforcement action have either been concluded or are pending with respect to an alleged violation. Unocal contends that the CDO issued by the Regional Board qualifies as an enforcement action that suffices to trigger a preclusive bar against the instant citizen suit, thereby requiring its dismissal.

33 U.S.C. § 1319(g)(6)(A) provides:

> [A]ny violation—
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under [33 U.S.C. § 1319(g), which allows EPA to assess civil penalties],
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [33 U.S.C. § 1319(g)], or
> >
> > (iii) *for which* the Administrator, the Secretary, *or the State has issued a **final** order not subject to further judicial review and the violator has paid a **penalty** assessed under [33 U.S.C. § 1319(g)], or such **comparable** State law*, as the case may be,
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). Unocal contends that the CDO and the settlement agreement constitute "a final order" under a state

law "comparable" to 33 U.S.C. § 1319(g) for which the violator has paid an assessed "penalty," thereby triggering the citizen suit bar under 33 U.S.C. § 1319(g)(6)(A)(iii). In order for dismissal on this ground to be appropriate, all of these conditions must be met.

a. "Final Order"

Plaintiffs argue that the CDO and settlement agreement do not constitute a "final order not subject to further judicial review." Under the settlement agreement, Unocal and the other refineries expressly retained the right to challenge in court in 1998 the final selenium limits specified in their NPDES permits when, under the CDO, they are finally obligated to comply with those limits.[11] In light of this provision, there indeed appears to be a substantial issue as to whether the CDO is a "final order" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii). However, because this issue was not well briefed by the parties and since there exist other bases for denying dismissal on preclusion grounds, the Court declines to reach this question.

b. "Comparable State Law"

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a penalty assessed under [33 U.S.C. § 1319(g)], or such comparable State law." In evaluating whether this provision is satisfied in this case, the Court must determine, first, what state law the putative

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[11] The settlement agreement provides that the refineries agree not to challenge the final selenium limits in court in 1998 if they are able to win an additional extension of the compliance schedule pursuant to ¶ 5 of the CDO. However, that concession is no concession at all, for if the refineries succeed in obtaining such an additional extension of the compliance deadline, then, of course, there will be no reason for them to challenge the limits.

penalty was assessed under and, second, whether that law is "comparable" to 33 U.S.C. § 1319(g).

i. The Regional Board's Action Was Taken under California Water Code § 13301

California law vests regional water boards with a variety of different prosecutorial tools for enforcing compliance with effluent limits or standards imposed under NPDES permits. These include issuance of cease and desist orders under California Water Code § 13301, issuance of cleanup or abatement orders under California Water Code § 13304, imposition of administrative civil penalties under California Water Code § 13385, and referral to the California Attorney General for civil prosecution.

It appears quite clear that in issuing the CDO, the Regional Board was exercising its authority under California Water Code § 13301, which empowers regional boards to issue cease and desist orders pursuant to which such boards may establish extended time-tables for compliance with Board-imposed effluent limits. Cal. Water Code § 13301(b). The CDO itself expressly states that it was issued "pursuant to Section 13301 of the California Water Code." CDO at 7. Moreover, the CDO offers the following explanation of the decisionmaking process that resulted in the settlement and issuance of the CDO:

> The Regional Board has considered the various enforcement and penalty options available to it regarding violation of [the NPDES permit], including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

CDO at 6.

Unocal appears to argue that since Unocal, Exxon, and Shell agreed to make a $2 million payment to the state as part of the settlement of which the CDO was a component, the Regional Board's enforcement action must be construed as a civil penalty action under California Water Code § 13385. Unocal speculates that if it, Exxon, and Shell had refused to agree to the payment, the Regional Board would then have instituted a civil penalty action under § 13385. However, as noted above, the CDO expressly categorized the actions taken as (1) entry of a cease-and-desist order under § 13301, and (2) settlement of the refineries' state court lawsuit. The fact that the Board identified its actions as such after first noting the different enforcement options available to it—including the option of imposing of a civil penalty under § 13385—makes clear that the Board expressly declined to invoke its § 13385 authority in issuing the CDO and entering the settlement agreement. The only mention of the $2 million payment in the CDO is found in the "findings" section, where the payments are described only as a "term" of the settlement of the state court lawsuit, CDO at 6; no mention of the payment appears in the "order" section of the CDO, and the document does not purport to order payment of the sum.

This labeling clearly was not accidental. The CDO and settlement agreement resulted from lengthy and detailed negotiations among the parties. The Court sees no reason to disregard the Regional Board and the parties' deliberate decision to label the Board action a cease-and-desist order, and the accompanying document a settlement agreement. If the Board and the parties had intended for the Board order and settlement agreement to be deemed a settlement of a threatened but unfiled civil penalty action, they could easily have so indicated. The Court must conclude from their failure to do so that they did not so intend. Since the Regional Board is vested with authority to choose which of its enforcement options to exercise, the Board's categorization of its action as a cease-and-desist action under § 13301 is

dispositive of the question of what type of enforcement action the Board attempted to take.

In light of the above, the Court concludes that, as a matter of law, the CDO was issued in an exercise of the Board's administrative enforcement authority under California Water Code § 13301 to issue cease and desist orders establishing time-tables for compliance with Board-imposed effluent limits. The Court further concludes that, as a matter of law, the settlement agreement was just that—a settlement of the refineries' state court lawsuit. The Court rules that, as a matter of law, neither instrument constituted an exercise of the Board's authority under California Water Code § 13385 to impose civil penalties.

ii. The "Comparability" Assessment Is Conducted By Examining the Particular State Statutory Enforcement Provision Involved, Not the State Statutory Enforcement Scheme as a Whole

The thrust of Unocal's argument as to why the "comparability" requirement is satisfied in this case focuses not on the particular statutory power that the Board was exercising in issuing the CDO and entering the settlement, but rather on the California law enforcement scheme as a whole. Unocal argues that even if the CDO was issued pursuant to California Water Code § 13301 and even if, as the Court concludes below, that enforcement provision is not comparable to 33 U.S.C. § 1319(g), the comparability requirement is still satisfied because the comparability assessment must be conducted by examining the state statutory enforcement scheme as a whole, not simply the particular state statutory enforcement provision under which the action in question was taken. Unocal argues that the California scheme, when all of its various enforcement provisions are considered, is comparable to 33 U.S.C. § 1319(g), thereby satisfying the requirement.

The issue here is whether the language "comparable state law" should be interpreted to mean "comparable state enforcement scheme" or "comparable state enforcement provision." While quite technical, this interpretive question is an important one which has not yet been resolved by the courts. Research has revealed only a single reported decision discussing this question at any length. That case, *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1991), did not construe the comparability requirement as it applies under 33 U.S.C. § 1319(g)(6)(A)(iii); rather it interpreted it under a neighboring provision, 33 U.S.C. § 1319(g)(6)(A)(ii), which reads:

> [A]ny violation—
>
> * * * * * *
>
> *(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law* ***comparable*** *to [33 U.S.C. § 1319(g)]*
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). However, because the language in the two provisions is parallel and the canon of statutory construction presumes that when Congress uses a term in more than one location in a statute, it is meant to have the same meaning, *see United States* v. *Thompson/Center Arms Co.*, --- U.S. ----, ---- n.5, 112 S.Ct. 2102, 2107 n. 5, 119 L.Ed.2d 308 (1992) (plurality opinion); *Mississippi Poultry Ass'n, Inc.* v. *Madigan*, 992 F.2d 1359, 1363 (5th Cir. 1993), *Scituate* is relevant to the instant question before this Court.

In *Scituate*, the state was prosecuting an enforcement action under a provision of state law that would not result in imposition of civil penalties against the Clean Water Act violator. Arguing that the comparability assessment required the court to compare the particular state enforcement

provision used by the state with 33 U.S.C. § 1319(g), the citizen suit plaintiff contended that the preclusive bar was not triggered since the state was proceeding under a provision that, unlike 33 U.S.C. § 1319(g), did not authorize imposition of civil penalties. However, the *Scituate* court concluded that, for policy reasons, the comparability requirement should be applied to the state enforcement scheme as a whole, not the particular enforcement provision at issue. The court reasoned that provision-by-provision analysis would mean that some state enforcement actions would not trigger the bar against citizen suits, and would thereby allow duplicative enforcement proceedings. The *Scituate* court concluded that Congress meant for citizen suits to be available only where the state is not addressing the problem at all, and not simply wherever a state decides not to seek civil penalties. *Scituate*, 949 F.2d at 555-56.

This Court is not persuaded by the reasoning of the *Scituate* court. For several reasons, the Court concludes that the comparability assessment must be made by looking to the particular state enforcement provision at issue, not the state scheme as a whole. First, the structure of § 1319(g) supports an inference favoring this conclusion. The Clean Water Act empowers EPA to respond to violations using any of a variety of enforcement options. However, the statute specifies that only where one specific type of EPA enforcement action — a penalty action under 33 U.S.C. § 1319(g) — has been taken are citizen suits precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). *Pendleton*, 11 F.3d at 885-86. Since whether an EPA enforcement action triggers the preclusive bar depends on the particular enforcement provision under which EPA proceeded, it would logically follow that the same would hold for state laws: that only where a state has proceeded (and assessed a penalty) under a state enforcement provision comparable to 33 U.S.C. § 1319(g) is the preclusive bar triggered. It would be odd indeed to construe the statute as requiring courts to conduct a comparison

between the federal 33 U.S.C. § 1319(g) enforcement provision on the one hand, and the whole of the state enforcement scheme on the other. Clearly, it is more natural to read 33 U.S.C. § 1319(g)(6)(A)(iii) as requiring a comparison between the specific state enforcement provision actually used and the specified federal enforcement provision, 33 U.S.C. § 1319(g).

The interpretation urged by Unocal would introduce an anomalous dichotomy into the statute, for state enforcement actions would then enjoy much broader preclusive effects against citizen suits than EPA actions. Any type of state enforcement action would trigger the preclusive bar so long as *somewhere* in the state's enforcement scheme there existed provisions comparable to 33 U.S.C. § 1319(g). Penalties imposed under enforcement provisions not affording procedural safeguards comparable to 33 U.S.C. § 1319(g) would bar citizen suits. Thus, nominal "penalties" imposed under state provisions lacking penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3), and without a right to public notice or opportunity for participation comparable to those provided under 33 U.S.C. § 1319(g)(4), would insulate polluters from citizen actions so long as the state had at its disposal — although had declined to use — other enforcement provisions that are comparable to 33 U.S.C. § 1319(g).

Although the federal enforcement scheme, of course, contains all of these features, federal enforcement actions trigger the preclusive bar only where they are taken under one particular enforcement provision: 33 U.S.C. § 1319(g). Surely the preclusive effect of state enforcement actions can be no broader.

Construing the statute to require enforcement provision comparability would not, as the *Scituate* court contended, be inconsistent with sensible policy or with the goals of the Clean Water Act. The Court can easily imagine that Congress, realizing that state enforcement agencies can be

susceptible to regulatory "capture" by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements. Congress might therefore sensibly have decided that the safeguard enforcement device of the citizen suit should be precluded only where a state has taken an enforcement action that approximates the rigor of a federal 33 U.S.C. § 1319(g) enforcement action.

The Court's conclusion as to application of the comparability requirement is also in accord with EPA's own administrative interpretation of the statute. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993). This interpretation of a provision of the Clean Water Act by the federal agency charged with its enforcement constitutes persuasive authority and further buttresses the Court's conclusion today.[12]

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[12] Where a legislative intent regarding a particular statutory issue is not evident from a statute's text or legislative history, courts will defer to the interpretation of the law favored by the agency charged with its enforcement, so long as the agency interpretation is not otherwise inconsistent with the plain language of the statute or with other of its provisions. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, this doctrine does not apply in this case, for the Court infers from the statute's text and structure a legislative intent regarding the question at issue. Nonetheless, the agency's interpretation constitutes persuasive authority supporting the Court's conclusion.

EPA has argued in other cases that in order for a state law to be comparable to 33 U.S.C. § 1319(g), it must have been certified as such by EPA pursuant to 33 U.S.C. § 1342(b). *See*

(continued...)

iii. California Water Code § 13301 Is Not "Comparable" to 33 U.S.C. § 1319(g)

Having concluded that the Court must compare California Water Code § 13301, the state enforcement provision under which the CDO was issued, with 33 U.S.C. § 1319(g) in order to determine whether the 33 U.S.C. § 1319(g)(6)(A)(iii) bar is triggered, the Court has little difficulty deciding that the two provisions are not "comparable."

In conducting such a comparability assessment, other courts have drawn guidance from remarks made on the floor of the Senate by Senator John Chaffee, the principal author and sponsor of the 1987 Clean Water Act Amendments. *See Atlantic States Legal Foundation* v. *Universal Tool and Stamping Co.*, 735 F.Supp. 1404, 1415 (N.D. Ind. 1990) (quoting remarks by Sen. Chaffee). In those remarks, Senator Chaffee stated:

> [T]he limitation of [33 U.S.C. § 1319(g)] applies only where a State is proceeding under a State law that is comparable to [33 U.S.C. § 1319(g)]. For example, in order to be comparable, a State law *must* provide for a right to a hearing and for public notice and participation procedures similar to those set forth in [33 U.S.C. § 1319(g)]; it *must* include analogous penalty assessment factors and judicial review standards and it *must* include provisions that are analogous to the other elements of [33 U.S.C. § 1319(g)].

133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (emphasis added), *quoted in Universal Tool*, 735 F.Supp. at 1415. EPA has also issued its own administrative interpretation of the

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[12] (...continued)
Scituate, 949 F.2d at 556 n.8. However, as this argument has not been raised by the parties on this motion, the Court shall not address it at this time.

comparability requirements. According to EPA, a state enforcement provision, in order to be comparable, must include the features listed by Senator Chaffee: a right to a hearing analogous to that provided under 33 U.S.C. § 1319(g)(2); public notice and participation requirements analogous to those of 33 U.S.C. § 1319(g)(4); a right to judicial review analogous to that provided under 33 U.S.C. § 1319(g)(8); and penalty assessment factors analogous to those enumerated in 33 U.S.C. § 1319(g)(3). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 4-6. EPA interprets the analogous penalty assessment factor requirement as meaning not only that the maximum potential penalty liability must be at least equivalent to the federal limits, and that the factors to be considered in arriving at the appropriate penalty must be adequate and appropriate, but also that the *actual penalty* collected or assessed must be adequate and appropriate. *Id.* at 5. Support for this interpretation is found in a congressional Conference Report interpreting the comparability requirement under a 1986 version of the Clean Water Act Amendments which contained a provision identical to 33 U.S.C. § 1319(g)(6)(A). (The 1986 bill was not enacted into law, but the following year the 1987 Clean Water Act Amendments were passed, containing the identical provision now codified at 33 U.S.C. § 1319(g)(6)(A).) *See* House-Senate Conference Report on Clean Water Act Amendments, H. Rep. 99-1004, 99th Cong., 2d Sess., *reprinted in* 132 Cong. Rec. 31577, 31616 (1986).[13] EPA

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[13] When a State has proceeded with an enforcement action relating to a violation with respect to which the Administrator [of EPA] or the Secretary [of the Army] is authorized to assess a penalty under this provision the Administrator and the Secretary are not authorized to take any action under [33 U.S.C. § 1319(g)] if the State demonstrates that the state-imposed

(continued...)

also advises that the state law must provide penalty collection authority and streamlined judicial collection procedures analogous to those of 33 U.S.C. § 1319(g)(9). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 6.

In light of the above legislative history and administrative interpretation by the agency charged with enforcing the statute at issue, the Court holds that the features enumerated in Senator Chaffee's remarks, in the EPA policy guidance, and in the Conference Report, are among those that a state enforcement provision must offer in order to be comparable to 33 U.S.C. § 1319(g). *See Universal Tool*, 735 F.Supp. at 1415.

Examining California Water Code § 13301, the Court notes, even before getting to the above factors, that the California law provision does not authorize imposition of civil penalties. The availability of such a remedy is, of course, a necessary prerequisite for "comparability," as is evident from the fact that 33 U.S.C. § 1319(g)(6)(A)(iii) requires not just that civil penalties be available, but that they actually be imposed before the preclusive bar can be triggered. Second, since the California law provision does not authorize penalties, it of course lacks penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3). The presence of such factors is a requirement for comparability. *Universal Tool*, 735 F.Supp. at 1415.

In light of the Court's rulings on the above factors, it is unnecessary for the Court to proceed further and determine whether the California provision satisfies the other

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[13] (...continued)
penalty is appropriate.

House-Senate Conference Report on Clean Water Act Amendments, H. Rep. 99-1004, 99th Cong., 2d Sess., *reprinted in* 132 Cong. Rec. 31577, 31616 (1986).

comparability requirements. The Court rules that, as a matter of law, California Water Code § 13301 is not "comparable" to 33 U.S.C. § 1319(g) within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).[14]

c. "Penalty"

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a *penalty* assessed under [33 U.S.C. § 1319(g)], or such comparable State law" (emphasis added). As noted above, Unocal contends that the $2 million payment that it, Exxon, and Shell agreed to make constitutes a "penalty" within the meaning of the statute.

As used in the Clean Water Act, the word "penalty" is a term of art referring to a payment that a polluter is assessed to pay by an enforcement agency. By its nature, a payment can be a penalty only where the statutory grant of authority exercised by the agency is one that empowers the agency to assess penalties. As explained above, the Court has concluded that in issuing the CDO, the Regional Board *was* exercising its authority under California Water Code § 13301 to issue cease and desist orders, and expressly *was not* exercising its authority under California Water Code § 13385 to impose civil penalties. The Court has also concluded that in entering the settlement agreement, the Board was simply settling the refineries' state court lawsuit and was not

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[14] This conclusion is reinforced by *Pendleton*, 11 F.3d 883, for it appears that a cease-and-desist action under California Water Code § 13301 is the equivalent of a federal administrative compliance action under 33 U.S.C. § 1319(a). Since the Ninth Circuit ruled in *Pendleton* that 33 U.S.C. § 1319(a) EPA compliance actions do not trigger the 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar, the Court's ruling today that actions taken under a state law counterpart to 33 U.S.C. § 1319(a) are not barred either gives the statutory scheme a logical parallelism.

purporting to exercise its enforcement authority under either of the above provisions. As California Water Code § 13301 does not empower the Board to assess civil penalties in enforcement actions taken pursuant to it, the Court concludes that the $2 million payment agreed to by Unocal, Exxon, and Shell pursuant to the settlement agreement was not, as a matter of law, a penalty within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

This conclusion is reinforced by the fact that the Board specifically avoided characterizing the payment as a penalty. First, both the CDO and the settlement agreement refer to the payment using only the verb "pay"; both studiously avoid any mention of a "penalty." CDO at 6; Settlement Agreement ¶ 3. Second, at a public hearing on the settlement agreement, the Board's Counsel carefully and deliberately avoided characterizing the settlement monies as a penalty:

> I could perhaps comment further on that question of penalty that Mr. Lozeau [representative of plaintiff San Francisco BayKeeper] raised. I think its true that there is no administrative civil liability action or [section] 13385 of the Water Code action in this case, which is the usual method that the Board takes to assess penalties.
>
> And I think if you look at the expressed language of the settlement, it says, "As part of the settlement, the companies shall collectively pay the Regional Board the sum of two million." The settlement document does not characterize this as a penalty. It characterizes it as a payment. And, therefore, I don't see a need to make any interpretation as to whether this is a penalty or not.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 37. Indeed, at the same hearing Ms. Margaret Rosegay, counsel for Unocal and for the refineries in the state court action, went even further, stating:

> It has always been the refineries' position that they have done nothing wrong and as a consequence *it is*

> *inappropriate to characterize the payments which are being made to the Board as a penalty*. Nevertheless, the fact remains that it is money which is being paid.... [I]t is being paid as a means of settling the lawsuit. And I think, for all practical purposes, it is, in fact, a penalty.

Id. at 38 (emphasis added). Although conceding that the payment might, practically speaking, function as a penalty, Ms. Rosegay continued to maintain that, legally speaking, it was not one.[15]

It appears quite clear that Unocal, Exxon, and Shell insisted as a condition of the settlement that the payment not be characterized as a "penalty" in order that the settlement not be construed as an admission of wrong-doing. This choice presumably explains as well why the Board and the refineries went out of their way to describe the enforcement action as a California Water Code § 13301 cease and desist action, rather than a California Water Code § 13385 civil penalty action. Indeed, later during the same public hearing a member of the Board admitted as much in the face of questioning by a representative of plaintiff Citizens for a Better Environment-California ("CBE"):

> *[T]he fact that it's not called penalties was part of negotiations*. It is penalties, that's plain and simple what it is.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 28 (emphasis added). Although this statement amounts to a frank admission that the payment functions like a penalty, the Board Member speaking

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[15] Strictly speaking, only the intent of the Regional Board is relevant, since only the Board is empowered to impose penalties. However, the intent and understanding of the refineries is also probative of the Board's intent, since issuance of the CDO and entry the settlement were pursuant to an agreement among those parties.

expressly kept to the position that there was an agreement not to classify the payment as one.[16]

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[16] Unocal cites comments made at the same public hearing by a representative of plaintiff CBE in which the speaker took issue, not with the Board's refusal to term the payment a "penalty," but rather with the amount of the payment, contending that it was too small. *See* Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 25-28 (comments of Mr. Greg Karras). However, any such comments made by a private citizen who was not a party to the settlement is of no relevance for determining whether the Board, or the other parties to the settlement, intended for the payment to be deemed a "penalty."

Unocal also cites the fact that in a letter commenting on the proposed settlement and CDO, EPA's regional office referred to the $2 million payment as a "penalty." *See* Letter to M. Anne Jennings, from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, Dec. 13, 1993, at 2. After oral argument, plaintiffs submitted to the court a letter from EPA's regional office in which EPA expressly disavowed that the use of the term "penalty" in the December 13 letter was intended to imply an opinion on the part of EPA on the above legal question. *See* Letter to Steven Ritchie, et al., from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, date-stamped June 9, 1994. EPA stated that if it had considered the legal question, it would have had to adhere to EPA's position on the application and interpretation of 33 U.S.C. § 1319(g)(6)(A)(iii) set forth in the agency's administrative guidelines. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993) *cited supra*. However, Unocal argues that the Court may not rely on the clarification contained in the June 9 letter, contending that, for several reasons, judicial notice may not properly be taken of the

(continued...)

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(2)

No. 96-747

In The

Supreme Court of the United States

October Term, 1996

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to 33 U.S.C. § 1319(g)(6)(A)(iii), an entity that violates its pollutant discharge permit limits imposed pursuant to the Clean Water Act can avoid a citizen penalty action for that violation if "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, . . . " The question presented is the following:

Did the Ninth Circuit err in concluding that Unocal cannot obtain a dismissal of a citizen penalty action alleging violations of Unocal's selenium discharge permit limits, when the record shows that Unocal never paid a penalty for its violations as required by 33 U.S.C. § 1319(g)(6)(A)(iii), but simply made a payment to the State of California to settle a prior lawsuit that Unocal brought against the State, and that the payment was not assessed under a state law provision comparable to the penalty provision of the Clean Water Act?

LIST OF PARTIES

The Respondents in this proceeding are Citizens for a Better Environment-California, San Francisco BayKeeper, Save San Francisco Bay Association, The Bay Institute of San Francisco, and Santa Clara Valley Audubon Society, all non-profit environmental organizations; and Kalon Wofford and Anthony Willis, individuals (hereinafter referred to as "Respondents").

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STATEMENT OF THE CASE

A. Pursuant to the Clean Water Act and EPA Directives, the State of California Imposed Limits on the Amount of Selenium Unocal May Discharge into San Francisco Bay.

Unocal operates an oil refinery in Rodeo, California, from which it discharges pollutants into San Francisco Bay ("the Bay"). Pursuant to the Clean Water Act, Unocal may only discharge such pollutants in the specific amounts set forth in its National Pollutant Discharge Elimination System ("NPDES") permit, which is issued by California's Regional Water Quality Control Board ("Regional Board"). 33 U.S.C. §§ 1311(a), 1342.[1]

Selenium, a highly toxic pollutant, *see* 40 C.F.R. § 401.15,[2] occurs in high concentration in the crude oil Unocal refines and is contained in the wastewater Unocal discharges into the Bay. Resp't App. at 78. Excess amounts of selenium are having a devastating effect on the health of the Bay and the ecosystems it sustains. *Id.* at 78, 87-88. In 1989, the Environmental Protection Agency ("EPA") concluded that the Upper San Francisco Bay was a "toxic hot spot" as a result of elevated levels of selenium and that Unocal was a "point source" of this selenium contamination. 33 U.S.C. §§ 1314(*l*)(1)(B) and (C); Excerpts of Record ("ER") 206-07, 222. EPA based its determination on three main factors: (1) selenium was found "in animal tissue samples collected from these areas"; (2) the California Department of Health Services had issued "a health advisory regarding the consumption of surf scoters and greater scaups [diving ducks] because of elevated levels of selenium observed in these birds"; and (3)

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[1] Unless otherwise noted, all section cites shall be to 33 United States Code. Cites to the United States Code are set forth in Respondents' Appendix ("Resp't. App.") at 106-26.

[2] Cites to the Code of Federal Regulations are set forth in Respondents' Appendix at 127-29.

there was ample "evidence of levels of bioaccumulation harmful to human health." (ER 170-71, 208.)

The Clean Water Act requires states to develop "individual control strategies" to limit the discharge of pollutants from point sources, such as Unocal, to achieve specific water quality standards within three years of the date that the individual control strategy is adopted. 33 U.S.C. § 1314(*l*)(1)(D). Pursuant to this requirement, the Regional Board in 1991 issued Order 91-026, which required Unocal to reduce its selenium discharges by December 12, 1993 to no more than an annual mass average of .85 pounds per day at a concentration not to exceed 50 parts per billion (the "final limits"). Resp't App. at 81. In the interim, the Regional Board required Unocal to comply with higher selenium discharge limits (the "interim limits"), which expired on December 12, 1993, when the final limits took effect. (ER 374-77.)

B. Unocal Sued to Avoid Compliance with the Final Limits, Which the Regional Board Agreed Not to Enforce.

Rather than come into compliance with its final limits, Unocal moved to have these limits repealed. First, Unocal, along with its trade association, Western States Petroleum Association ("WSPA"), and several other refiners operating on the Bay, petitioned the State Water Resources Control Board ("State Board") to overturn the final limits, arguing that selenium discharges into the Bay could not be regulated under the Clean Water Act. *See* Resp't App. at 88-89. The State Board dismissed the petition. *Id.* Unocal, WSPA, and the other refiners then filed a Petition for Writ of Mandate in California state court to have the final limits set aside. *Id.* at 89; ER 235-50. Before the state court could reach a decision on the merits of the action, Unocal, WSPA and the other refiners reached a settlement with the Regional Board, and the refiners and WSPA agreed to dismiss their state court action against the Regional Board.

The Settlement Agreement provided that the three refiners resisting compliance with the final limits would pay the Regional Board $2 million, of which Unocal's portion was $780,000. Resp't App. at 102; ER 95-97.[3] In exchange for the Settlement Agreement, the Regional Board issued a separate Cease and Desist Order ("CDO") under California Water Code § 13301.[4] The CDO provides that the Regional Board will refrain from enforcing the final limits until at least July 31, 1998, as long as Unocal complies with the far less stringent interim limits in the meantime. Resp't App. at 96-97. The CDO does not assess any monetary payments or penalties against Unocal. It does not require Unocal to expend a specific sum of money on remediation efforts.[5] Nor does the CDO

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[3] Approximately 90% of these funds were paid to the California Department of Justice, which represented the Board in the state court action, and the remaining funds were deposited into California's Water Pollution Cleanup and Abatement Account. Resp't App. at 102-03.

[4] All references herein to the "Water Code" refer to the California Water Code. All cites to the California Water Code are set forth in Respondents' Appendix at 130-39.

[5] Unocal asserts in its Petition for Writ of Certiorari ("Petition") that it is unable to comply with the final limits because of a lack of available technology. (Pet'r Br. at 4.) The facts of this and related cases indicate otherwise. In the state court action, Unocal, along with Shell and Exxon, similarly asserted that they could not comply with the final limits due to an alleged lack of available technology. (ER 246.) Based *only* upon "information presented by the dischargers," and despite the fact that three other refiners operating on the Bay comply with the final limits, the Regional Board incorporated the refiners' position in the CDO. Resp't App. at 89-90.

However, only one year after the Regional Board issued the CDO, Shell entered into a consent decree with citizens who had sued Shell for similar violations of its final selenium limits. *See California Pub. Interest Research Group (CalPIRG) v. Shell Oil Co.*, 840 F. Supp. 712 (N.D. Cal. 1993); Plaintiffs'/Appellees' Request for Judicial Notice ("Plaintiffs' RJN") at 25-51, *Citizens for a Better Environment-California, et al. v. Union Oil Company of California*, No. 95-15139 (9th Cir.). That consent decree, which requires Shell to reduce its selenium discharges by one ton

state that Unocal is relieved from having to comply with the final limits until July 31, 1998. Instead, the CDO specifies that the final limits "become effective on December 12, 1993." *Id.* at 88. The CDO only represents that the Regional Board will not enforce the final limits until July 31, 1998, unless Unocal violates a term of the CDO. *Id.* at 96-98.[6] The CDO also provides that if the refiners are unable to identify and implement a workable selenium removal technology by July 31, 1998, they can request a further extension of this deadline. *Id.* at 97-98. Finally, the refiners expressly preserved the right to again challenge the validity of the final limits if the Board ever attempts to enforce the final limits. *Id.* at 103.

The Regional Board released the Settlement Agreement and proposed CDO to the public on November 10, 1993, before the final limits came into effect on December 12, 1993. (ER 43-60.) Thus, Unocal was not in violation of the final limits at the time of the settlement.[7]

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more than is required under the CDO, reflects the fact that Shell can reduce its selenium discharges in a manner that (1) will not generate hazardous waste or (2) will generate hazardous waste that can be disposed of safely. Plaintiffs' RJN at 25-51.

[6] Unocal implies in its Petition that the CDO legally deferred the deadline by which Unocal must comply with the final limits until July 31, 1998, and asserts that the Ninth Circuit's opinion leaves Unocal subject to both the interim limits and the final limits. As the Ninth Circuit found, and Unocal does not contest in its Petition, the CDO did not and could not legally defer the deadline by which Unocal must comply with the final limits. *See* Argument, § C.3.b., *infra*.

[7] Throughout its Petition, Unocal states, without any support in the record, that the settlement was reached to resolve the State's "civil penalty claims" against Unocal. This is a misrepresentation of the facts. The settlement was reached before the final limits even went into effect. The Regional Board never commenced or even announced that it intended to commence a penalty enforcement proceeding against Unocal for its anticipated violation of the final limits. The documents Unocal cites indicate only that the Regional Board intended to commence enforcement proceedings against Shell Oil Company, which also operates a refinery on

C. The Regional Board Did Not Require Unocal to Pay a Penalty for Unocal's Failure to Comply with the Final Limits.

At a public hearing regarding the Settlement Agreement and CDO, the Regional Board held that "it is inappropriate to characterize the payment [made by Unocal and the other refiners] . . . as a penalty," because the money was "being paid as a means of settling the lawsuit." (ER 150.) At the same hearing, the Regional Board's counsel concurred:

> . . . if you look at the expressed language of the settlement, it says, 'As part of the settlement, the companies shall collectively pay the Regional Board the sum of two million.' *The settlement document does not characterize this as a penalty. It characterizes it as a payment.*
>
> (ER 149 (emphasis added).)[8]

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the Bay, and which failed to comply even with its less stringent interim limits. *CalPIRG*, 840 F. Supp. at 715. *See also*, ER 369.

[8] Unocal makes much of one letter from EPA, in which EPA referred to the refiners' settlement payment as a penalty. However, in a subsequent letter, EPA clarified that its informal use of the term "penalty" was not intended to imply an opinion that the payment legally constituted a penalty that could preclude Respondents' citizen suit. Resp't App. at 140-41. The United States Department of Justice again clarified the meaning of EPA's letter in its amicus brief to the Ninth Circuit and at oral argument before the Ninth Circuit, where the United States argued that Unocal's payment was not a penalty and should not operate to preclude Respondents' citizen suit. Amicus Curiae Br. for the United States on Behalf of Respondents, at 29-34, *CBE, et al. v. Unocal*, No. 95-15139 (9th Cir. 1996).

The CDO itself states that the Regional Board specifically considered and rejected the option of imposing a penalty:

> The Regional Board has considered the various enforcement and penalty options available to it regarding violation of Order No. 91-026, including the issuance of a cease and desist order or a cleanup or abatement order [or] imposition of an administrative civil penalty. . . . [T]he Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.
>
> Resp't App. at 94-95.

D. Citizens Sued to Enforce the Final Limits.

The final limits became effective on December 12, 1993, and Unocal immediately began violating those limits. Resp't App. at 3. Unocal has violated its final limits on a continuing basis since that date. *Id.* Respondents therefore filed this citizen suit in federal court on March 2, 1994, pursuant to 33 U.S.C. § 1365(a)(1), seeking an injunction against Unocal's continued illegal selenium discharges, declaratory relief and civil penalties.

On May 2, 1994, Unocal filed a Motion to Dismiss Respondents' citizen suit, arguing that the Settlement Agreement should bar this citizen suit under 33 U.S.C. § 1319(g)(6)(A)(iii) (hereinafter "subdivision (iii)"), the subdivision of the Clean Water Act that precludes citizen penalty actions when the state has taken prior penalty enforcement action against the violator for the same violations that the citizen suit seeks to enforce. Resp't App. at 48-49.

The district court denied Unocal's Motion to Dismiss, finding that the Settlement Agreement did not satisfy the criteria of subdivision (iii). Resp't App. at 68-69. Subdivision (iii) precludes citizen penalty actions only if *all* of the following criteria are satisfied: (a) the state has issued a final order not subject to further judicial review, (b) the violator has paid a penalty, and (c) the penalty was assessed under a state law "comparable" to 33 U.S.C. § 1319(g), the subsection of the

Clean Water Act authorizing the imposition of civil penalties. 33 U.S.C. § 1319(g)(6)(A)(iii). The district court made the factual finding that Unocal's $780,000 payment was not a penalty, but a sum of money Unocal paid in exchange for the State's agreement not to enforce Unocal's selenium discharge limits for at least four and one-half years, until July 31, 1998. Resp't App. at 26, 28, 68. The district court further held that the state law under which the CDO was issued, which was not the state law authorizing the imposition of civil penalties, was not comparable to the penalty provision of the Clean Water Act. *Id.* at 59-62.

The Ninth Circuit affirmed the district court's fact-based findings and resulting order. Resp't App. at 5-16.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit's decision is not appropriate for review by this Court. The Ninth Circuit affirmed the district court's factual finding that the payment Unocal made was not a penalty, and this finding presents no question of federal law upon which there is a split between the circuits. *See* Argument, Sections A., B., *infra*. The determination that the payment was not a penalty is, by itself, dispositive of Unocal's motion to dismiss, because all three criteria set forth in subdivision (iii) must be satisfied to preclude this citizen penalty action.[9]

Furthermore, Unocal is seeking review of the Ninth Circuit's interpretation of a seldom-utilized statute. Since 1987, when subdivision (iii) was enacted, no federal court of appeal other than the Ninth Circuit has analyzed whether a citizen penalty action is barred by a prior, concluded state enforcement proceeding. In fact, subdivision (iii) has been addressed

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[9] Section 1319(g)(6)(A) precludes only "civil penalty action[s]." 33 U.S.C. § 1319(g)(6)(A). Thus, even if the Court were to reverse the Ninth Circuit's decision, only Respondents' civil penalty claims would be precluded. Respondents' claims for injunctive and declaratory relief would survive.

by only a few of the United States District Courts outside of the Ninth Circuit, and of those cases, only one has considered whether a settlement between a state and a permit violator can bar a citizen suit when the settlement did not require the violator to pay a penalty. *See* Argument, Section C., *infra*.[10] The First and Eighth Circuit decisions Unocal cites for its interpretation of "comparable state law" arose under an entirely different subdivision of § 1319(g)(6)(A) than the one at issue in this case. *Id.* Because no other circuit has interpreted the meaning of the term "comparable state law" within the context of subdivision (iii), there is no split regarding the interpretation of that provision that requires resolution by this Court.

Finally, there is no inconsistency between the Ninth Circuit's opinion and any decision by this Court. To the contrary, Supreme Court precedent supports Respondents' right to sue Unocal under the Clean Water Act for Unocal's ongoing violation of the final limits. *See* Argument, Section D., *infra*.[11]

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[10] Thus, even if there are 75,000 companies and municipalities nationwide that hold NPDES permits (*see* Pet'r Br. at 2, 8 and 25), and even if there have been hundreds of citizen suits seeking enforcement of those permits (*see* Pet'r Br. at 8), only one other case filed in the federal courts over the past nine years has considered the precise issue presented in the instant case.

[11] Additionally, Unocal's Petition is premature, because a final disposition has not been reached in this case. Allowing this case to proceed to judgment may render Supreme Court review unnecessary. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree").

A. The District Court's Conclusion that Unocal's Settlement Payment Was Not a Penalty, Which the Ninth Circuit Affirmed, Is the Type of Fact-Bound Determination that Does Not Warrant Review By This Court.

This Court has repeatedly stated that it does not sit to resolve factual disputes. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *see also*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Yet that is precisely what this Court must do to resolve the issues presented in Unocal's Petition.

To preclude Respondents' citizen penalty action under subdivision (iii), Unocal must, *inter alia*, demonstrate that the State assessed a penalty against Unocal.[12] Unocal does not dispute that the State must have actually assessed a penalty before Respondents' penalty claims can be precluded. What Unocal does contest is the district court's factual determination that the settlement payment Unocal made was not a penalty. However, this Court should not enter the fray of this factual dispute simply because the lower court's findings were not to Unocal's liking. *Johnston*, 268 U.S. at 227.

The Ninth Circuit affirmed the district court's factual findings, rendering these findings even less appropriate for certiorari. "A court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also*, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.").

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[12] Pursuant to subdivision (iii), Unocal must also show that the penalty was assessed under a state law comparable to 33 U.S.C. § 1319(g), and that the State issued a final order not subject to further judicial review.

1. The Question of Whether Unocal's Payment Was a Penalty Is Predominantly Fact-Based.

Unocal argues for the first time in its Petition to this Court that the question of whether its payment to the State of California was a penalty is an issue of federal law. Unocal also suggests that the district court determined that the payment was not a penalty *only* because the CDO did not label it as such. (Pet'r Br. at 6.) Unocal's assertions misrepresent the basis for the Ninth Circuit's and district court's opinions in this case. As set forth below, there were four principal factual grounds for the district court's determination, as affirmed by the Ninth Circuit, that Unocal's payment was not a penalty. These findings of fact need not be revisited by this Court.

First, the district court considered that Unocal negotiated with the Regional Board to ensure that Unocal would make a payment, rather than be assessed a penalty, and that both Unocal and the Regional Board denied that the payment was a penalty. Resp't App. at 63-67; ER 140, 149, 150.[13] Unocal admitted that it took steps to ensure that it would not pay a penalty because of the serious stigma that attaches to penalties. Counsel for Unocal stated at the hearing on Unocal's Motion to Dismiss in the district court that "there simply was agreement that we would not have to sign on to paperwork that characterized it as a penalty, *because of the punitive and bad conduct implications that the general public takes from that term*." (ER 264 (emphasis added).) As the district court found, "[i]t appears quite clear that Unocal . . . insisted as a condition of the settlement that the payment not be characterized as a 'penalty' in order that the settlement not be construed as an admission of wrongdoing." Resp't App. at 65. The Ninth Circuit affirmed that "Unocal itself insisted on

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[13] Unocal claims that the payment had to be a penalty because "there is nothing else it could have been; . . . " (Pet'r Br. at 21.) This is wrong. The payment was what counsel for Unocal and the Board said it was: a payment in exchange for the Regional Board's agreement not to enforce the final limits. Resp't App. at 53, 67.

characterizing the financial transfer as a 'payment' and not a 'penalty' at the time of the state action settlement." *Id.* at 9.

Second, the district court found that Unocal's settlement payment did not function as a penalty. Resp't App. at 63-67. The function of a penalty is to punish permit violators and deter future violations. *Tull v. United States*, 481 U.S. 412, 422-23 (1987). The district court found that Unocal admitted that it has not been punished or deterred by virtue of making the settlement payment. Resp't App. at 27, 29, 63-67. The Ninth Circuit affirmed this conclusion: "the fairest characterization of the $780,000 payment is that it was not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action." *Id.* at 9-10. As Unocal's counsel explained at the public hearing on the CDO, "[i]t has always been the refineries' position that they have done nothing wrong and as a consequence it is inappropriate to characterize the payments which are being made to the Board as a penalty." (ER 150.) Unocal's counsel reiterated at oral argument before the district court that "[W]hile the state might require payment of money, it should not be characterized in such a way that the dischargers are made to agree or admit that they deserved to be punished." (ER 263.)

The district court found, and the Ninth Circuit confirmed, that it is wholly inconsistent and at this late date opportunistic for Unocal on the one hand to deny that it has engaged in any violation of the final limits while on the other hand to argue that the settlement payment should now be termed a penalty in order to preclude this citizen penalty action. Resp't App. at 9, 67. Both courts resolved that "Unocal simply cannot have it both ways." *Id.*

Third, the district court's determination that Unocal's settlement payment was not a penalty was further based on the fact that the Regional Board did not consider specific and mandatory penalty assessment factors required by Water Code § 13385 when the Regional Board entered into the Settlement

Agreement with Unocal.[14] Resp't App. at 60-62. The Ninth Circuit affirmed this factual determination. *Id.* at 8-10.

The penalty assessment factors are designed to ensure that the penalty punishes and deters violators. *Tull*, 481 U.S. at 422-23. Those factors include "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require."[15] Cal. Water Code § 13385(e). The district court found, and the Ninth Circuit affirmed, that the Regional Board did not consider any of these factors, including the economic benefit to Unocal of violating the final limits, when it agreed that Unocal would pay $780,000 to the state to settle the state court action. Resp't App. at 10, 60-62. "[T]here was no formal sorting of the economic benefits to Unocal of non-compliance and thus no assurance that Unocal has fully disgorged the benefit it receives from violating effluent limits." *Id.* at 10.[16]

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[14] The CDO was not issued under Water Code § 13385, but under Water Code § 13301. Resp't App. at 95 ("It is hereby ordered, pursuant to Section 13301 of the California Water Code that [Unocal] shall cease and desist. . . . "). The parties do not dispute this fact. Resp't App. at 11. Water Code § 13301 only authorizes issuance of cease and desist orders; civil penalties cannot be assessed under Water Code § 13301. California Water Code § 13301; Resp't App. at 61-62.

[15] These factors are the same as the factors that must be considered when assessing a penalty under the Clean Water Act. 33 U.S.C. § 1319(g)(3); Resp't App. at 10.

[16] Unocal claims that its $780,000 payment must be a penalty because it is in excess of the maximum administrative penalty EPA can assess under § 1319(g). (Pet'r Br. at 18.) This is not an apt analysis. To be a penalty under a state law comparable to § 1319(g), the payment must have been assessed under Water Code § 13385, which has no maximum for penalties. Cal. Water Code § 13385. Furthermore, Unocal admits that the amount of money it paid does not determine whether the payment was a penalty. (Pet'r Br. at 18.)

Fourth, the district court also considered the fact that the Regional Board did not follow the procedures required by Water Code § 13385 for the imposition of civil penalties when the Regional Board settled the state court action and issued the CDO. Resp't App. at 60-62. Specifically, the Regional Board did not issue a complaint, issue a proposed decision, allow each member of the Regional Board independently to review the record, or issue a final order imposing penalties, as required by the Water Code when assessing penalties. Cal. Water Code §§ 13323, 13385; Resp't App. at 60-62.[17] The Ninth Circuit affirmed this factual finding, which Unocal did not dispute: "[Unocal] cedes that the specific requirements of § 13385 were not adhered to." Resp't App. at 11.

These four factual findings are the main grounds for the district court's holding that the payment was not a penalty. Resp't App. at 67. The Ninth Circuit affirmed the district court's interpretation of these facts. *Id.* at 10. Unocal has presented no reason for this Court to revisit this factual determination.

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[17] California law also requires that civil penalties be paid within thirty days of the penalty assessment. Cal. Water Code §§ 13323, 13385. Unocal was given a full year after the CDO was issued to make its settlement payments. Resp't App. at 10. The Ninth Circuit took note of this fact when affirming the district court's determination that the payment was not a penalty. *Id.* The Ninth Circuit also noted that only 10% of Unocal's payment was deposited into an account designated for civil penalties. *Id.* at 9. State law requires *all* civil penalties to be paid into this account. Cal. Water Code § 13385. Furthermore, payments other than civil penalties are deposited into this account, including all monies contributed to the State Board and all monies collected in settlement of any proceeding brought pursuant to the Water Code. Cal. Water Code § 13441. Thus, the fact that Unocal deposited 10% of its payment into this account does not mean that the 10% was a penalty.

2. There Is No Split Between the Circuits on the Issue of what Constitutes a Penalty.

In an attempt to disguise that the district court's fact-bound determination that Unocal has not paid a penalty is not worthy of certiorari, Unocal claims that the Ninth Circuit's decision that Unocal did not pay a penalty is in conflict with the Eighth Circuit's holding in *Arkansas Wildlife Fed'n v. ICI Ams. Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995). (Pet'r Br. at 20-21.) There is no such conflict.

Arkansas Wildlife involves wholly different facts than are present in this case. In *Arkansas Wildlife*, the defendant sought to preclude a citizen suit under § 1319(g)(6)(A)(*ii*) ("subdivision (ii)"), a separate subdivision of § 1319(g)(6)(A) than is at issue here.[18] 29 F.3d at 378. Moreover, it was *uncontested* in that case that the state agency had taken a penalty enforcement action against the defendant and that the defendant had paid two separate penalties for violations of its discharge limits. *Id.* at 378-79.[19] In contrast, in this case, no penalty enforcement action has been taken against Unocal, and Unocal has not paid a penalty.

The quote Unocal excerpts from *Arkansas Wildlife* – "it would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the discharger] prevailed in some fashion or because a compromise was reached," 29

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[18] Subdivision (ii) precludes citizen penalty actions for violations "with respect to which the State has commenced and is diligently prosecuting an action under a State law comparable to this subsection."

[19] "The [Consent Administrative Order issued by the State] required [defendant] to pay a civil penalty. . . . [B]y December of 1991, [defendant] was not in compliance. . . . [The state agency] . . . assessed another penalty. . . . In the present case, the facts were not in material dispute." *Arkansas Wildlife*, 29 F.3d at 378-79.

Additionally, in *Arkansas Wildlife*, the state agency took the history of defendant's violations into account when determining the amount of the penalty. 29 F.3d at 380. In the instant case, by contrast, no penalty assessment factors were taken into account when the Regional Board settled Unocal's state court action. *See* Argument, Section A.1., *supra*.

F.3d at 380 – interprets subdivision (ii)'s requirement that the state be "diligently prosecuting" an action against the violator in order to preclude a citizen penalty action. *Id.* Unocal takes the quote out of context. The Eighth Circuit was not ruling on whether the defendant had paid a penalty, but was determining that the state was "diligently prosecuting" an action against the defendant, a requirement not even at issue in the instant case.[20]

Given the divergent postures of these cases, the *Arkansas Wildlife* decision does not bear at all on the factual determination of whether a penalty has been paid in this case. There is no conflict between the Eighth and Ninth Circuits on the question of what constitutes a penalty.

B. There is No Direct Split Between the Circuits on the Issue of what Constitutes a "Comparable State Law" As That Term Is Used in Section 1319(g)(6)(A)(iii).

Unocal attempts to manufacture a direct conflict between the Ninth Circuit's decision below and the decisions of two other circuit courts on the issue of whether a citizen penalty action can be precluded under subdivision (iii) when the state did not assess a penalty under the precise provision of state law authorizing administrative penalties. (Pet'r Br. at 17.)[21]

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[20] Unocal also implies that the plaintiffs in *Arkansas Wildlife* were challenging whether the defendant had paid a penalty at all because the penalties assessed were minimal. (Pet'r Br. at 20.) Again, this misrepresents the facts. The *Arkansas Wildlife* plaintiffs did not contest that the defendant had actually paid two penalties. 29 F.3d at 378-79. Rather, the plaintiffs challenged whether or not the state agency was "diligently prosecuting" an action against the defendant because the state assessed only minimal penalties. *Id.* at 380. There was no factual dispute, as exists here, concerning whether a penalty had been paid.

[21] The Ninth Circuit's finding that "Unocal has not paid a penalty" was a sufficient basis for its conclusion that "the § 1319(g)(6)(A)(iii) bar to citizen suits does not apply." Resp't App. at 9-10. Nevertheless, the court took the next step in analyzing the statute and found that Unocal's payment was not "assessed under . . . subsection [1319(g)], or such comparable State

Contrary to Unocal's argument, there is no direct split among the circuits that this Court must resolve.

The Ninth Circuit's decision below is the only circuit court opinion interpreting subdivision (iii). In the nine years since Congress enacted § 1319(g)(6)(A), only a handful of other cases in the district courts have interpreted subdivision (iii)'s bar on citizen penalty actions when the state's enforcement has concluded. *See California Sportfishing Protection Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 801, 803-05 (E.D. Cal. 1995); *United States v. City of Toledo*, 867 F. Supp. 603, 606-07 (N.D. Ohio 1994); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434-36 (D. Col. 1993); *Saboe v. Oregon*, 819 F. Supp. 914, 916-19 (D. Ore. 1993); *Natural Resources Defense Council v. Vygen Corp.*, 803 F. Supp. 97, 100-02 (N.D. Ohio 1992); *Public Interest Research Group v. GAF*, 770 F. Supp. 943, 948-51 (D.N.J. 1991); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1415-17 (N.D. Ind. 1990). Of those cases that were decided by district courts outside of the Ninth Circuit, only one interpreted subdivision (iii) to preclude a citizen penalty action, and it did so because the violator had already paid a penalty for the same violations the citizens sought to enforce. *Sierra Club*, 838 F. Supp. at 1434, 1436. This conclusion is not at odds with the Ninth Circuit's holding below. Furthermore, only one of the cases interpreting subdivision (iii) has addressed the precise issue involved here – whether a settlement reached between the state enforcement agency and the permit violator, which concludes the state enforcement, does not bring the violator into compliance, and does not require the violator to pay a penalty, can preclude a citizen penalty for those same violations. *City of*

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law. . . . " *Id.*; § 1319(g)(6)(A)(iii). Thus, even if there were a direct split between the circuits on the issue of the meaning of "comparable state law" and the split were resolved against the Ninth Circuit, this still would not result in the reversal of the Ninth Circuit's conclusion that Respondents' citizen penalty action proceeds, because the lower courts' finding that Unocal did not pay a penalty to the State provides an independent basis for affirmance.

Toledo, 867 F. Supp. at 606-07. In that case, the court concluded, as did the Ninth Circuit here, that the citizen penalty action was not barred. *Id.*

Unocal nevertheless argues that the Court should review the Ninth Circuit's decision because it is allegedly in direct conflict with *North and South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991) and *Arkansas Wildlife*, 29 F.3d at 381-82.[22] However, as Unocal acknowledges, both *Scituate* and *Arkansas Wildlife* interpret § 1319(g)(6)(A)(ii), a different subdivision than is addressed in the instant case. (*See* Pet'r Br. at 15 n.13.)

The express terms of subdivision (iii) clearly provide that in the case of a concluded governmental enforcement action, citizens cannot bring a duplicative claim for penalties if "the State has issued a final order not subject to further judicial review and the violator *has paid a penalty* assessed under this subsection, or such comparable State law, as the case may be, . . ." 33 U.S.C. § 1319(g)(6)(A)(iii) (emphasis added). Subdivision (iii) explicitly requires the assessment of a penalty. Nonetheless, Unocal argues that "comparable state law" refers to a state's entire statutory scheme for enforcing permit violations, rather than the specific provision of state law authorizing administrative penalties. Unocal's argument is belied by subdivision (iii)'s plain terms. As the Ninth Circuit found, under subdivision (iii) the "comparability" analysis must be conducted by examining the state statutory enforcement provision actually used by the state, and not the state statutory scheme as a whole, to determine whether a penalty was actually assessed.[23] Resp't App. at 11-12, 56-57.

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[22] No circuit courts other than the First, Eighth and Ninth have interpreted the terms of any of the subdivisions of § 1319(g)(6)(A).

[23] State agencies cannot assess penalties except under specific statutory authorization, such as California Water Code § 13385. Water Code § 13301, the provision of state law under which the Board expressly issued the CDO, does not authorize the Board to impose penalties and contains no penalty assessment factors. Cal. Water Code § 13301. It is in no way comparable to § 1319(g), which sets forth the procedures and

Subdivision (ii), on the other hand, deals with cases involving ongoing governmental enforcement and precludes citizen penalty actions for any violation "with respect to which a state has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . . " Subdivision (ii) does not contain the term "penalty" as does subdivision (iii). Thus, in *Scituate* and *Arkansas Wildlife*, the courts concluded that subdivision (ii)'s comparability requirement is met when the state "statutory scheme" contains a penalty provision comparable to 33 U.S.C. § 1319(g), the federal provision that authorizes EPA to assess administrative penalties. The First and Eighth Circuits determined that it is not necessary that the state actually be pursuing a penalty action against the violator, as long as state law provides the state with the power to do so. *Scituate*, 949 F.2d at 555-56; *Arkansas Wildlife*, 29 F.3d at 381-82. This interpretation of subdivision (ii) simply does not translate to subdivision (iii), which by its plain terms requires the violator to have paid a penalty.[24] As such, there is no direct conflict between the circuits regarding the correct interpretation of subdivision (iii)'s preclusion provision that requires this Court's attention.

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substantive considerations for EPA's assessment of penalties. 33 U.S.C. § 1319(g).

[24] Unocal argues that Congress revealed its intent that "comparable state law" mean any enforcement option available to the state when it deleted the requirement that the state agency be "diligently pursuing assessment of a civil penalty under section 309(g) of this Act" and replaced it with " 'the more general comparable State law' language." (Pet'r Br. at 17.) The legislative history Unocal cites is for subdivision (ii). Congress did not delete the term "penalty" from subdivision (iii), the particular preclusion provision at issue here. Furthermore, the change in the language of subdivision (ii) reflects Congress' acknowledgement that most states have their *own* laws authorizing state agencies to enforce permits, and that therefore those states do not "pursue" penalties "under section 309(g) of this Act," which gives EPA authority to assess penalties against permit violators.

C. The Ninth Circuit's Holding that This Citizen Penalty Action Is Not Barred by the Settlement of Unocal's Lawsuit Against the State Is Consistent with This Court's Decision in *Gwaltney*.

Contrary to Unocal's assertion, the Supreme Court's decision in *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), is not in conflict with, and indeed supports, the Ninth Circuit's decision that Respondents' case, which seeks to redress Unocal's ongoing violation of the final limits, should proceed. Unocal's argument is untenable, as it is based on a distorted reading of dictum from the case.[25] In *Gwaltney*, this Court held simply that citizen suits cannot be brought for wholly past violations. 484 U.S. at 64.[26] The Court reached this conclusion by interpreting the plain language of the statute. The Court analyzed 33 U.S.C. § 1365(a), which authorizes citizen suits against any person "alleged to be in violation" of the Act, and interpreted it to require that there be a reasonable likelihood that the defendant is violating the Act at the time the citizen suit is filed. *Id.* at 56-57, 65.

There is no dispute that Unocal consistently has been "in violation" of its final limits since they went into effect on December 12, 1993. Resp't App. at 3. Respondents' citizen suit is therefore necessary to bring Unocal into compliance with its final selenium discharge permit limits and fulfills the purpose of citizen suits described in *Gwaltney*.

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[25] *Gwaltney* arose prior to the enactment of § 1319(g)(6)(A). It therefore does not address § 1319(g)(6)(A)'s bar on citizen penalty actions that duplicate government penalty enforcement actions.

[26] The plaintiffs in *Gwaltney* brought suit in June 1984 against a meat packing plant that discharged pollutants in excess of its permit limits between 1981 and May 1984. By May 1984, before the suit was filed, the defendant upgraded its wastewater treatment system and stopped violating its permit limits. 484 U.S. at 53-54. Neither EPA nor the state had taken any enforcement action against the defendant in that case for these violations. *Id.* at 54.

1. Following *Gwaltney*, the Ninth Circuit and District Court Interpreted § 1319(g)(6)(A)(iii) As It Is Written.

In *Gwaltney*, the Supreme Court instructed that "the starting point for interpreting a statute is the language of the statute itself." 484 U.S. at 56, quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania*, 447 U.S. at 108.

In its Petition, Unocal claims that the lower courts' decisions are contrary to *Gwaltney* because the Ninth Circuit and district court followed the plain language of § 1319(g)(6)(A) instead of making a ruling based upon general policy concerns about preserving the discretion of governmental agencies to choose their methods for enforcing permits. (Pet'r Br. at 10-13.) The Ninth Circuit, in a previous case interpreting a separate subdivision of § 1319(g)(6)(A), had already rejected this argument, refusing "to abandon the clear language that Congress used when it drafted the statute" in favor of "general arguments about congressional intent and the EPA's need for discretion. . . . " *Washington Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993).

In the instant case, the district court and the Ninth Circuit again refused to allow policy concerns to override the plain language of the statute. Resp't App. at 11-16. Instead, the lower courts did exactly what this Court in *Gwaltney* instructed. They interpreted subdivision (iii) as it is written, to bar citizen penalty actions only when the citizen suit seeks to prosecute violations for which "the violator has paid a penalty." *Id.* at 14, 59-68.

2. The Ninth Circuit Determined that Because Respondents' Action Seeks to Prosecute Unocal for Violations That the Board Has Not Enforced, Respondents' Suit Supplements Governmental Enforcement.

In an attempt to portray the lower courts' decisions as contrary to *Gwaltney*, Unocal excerpts the Supreme Court's dictum regarding the dangers of permitting citizen suits for wholly past violations of the Clean Water Act. (Pet'r Br. at 10.)[27] In *Gwaltney*, the Court stated that "[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. The Court then illustrated its concern with an example. The Court hypothesized a situation in which EPA decided to not seek civil penalties against a violator but instead issued a compliance order under 33 U.S.C. § 1319(a) that required the violator to take "some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Gwaltney*, 484 U.S. at 61. The Supreme Court noted that under these circumstances, where the extreme and expensive corrective action *ended the violation*, to allow a subsequent citizen suit seeking penalties that EPA decided to forego for those same, wholly past violations "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 58-59, 61. This hypothetical has nothing to do with subdivision (iii)'s preclusion of citizen penalty actions and is in no way analogous to the circumstances giving rise to Respondents' citizen suit.

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[27] Unocal contends incorrectly that the Court's dictum in *Gwaltney* constitutes the Court's holding in that case. (Pet'r Br. at 10.) This is plainly not so. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

Respondents' citizen suit is precisely the type of case this Court approved in *Gwaltney*. In contrast to the *Gwaltney* hypothetical, the Regional Board failed to bring Unocal into compliance with the final limits. Unocal has consistently violated the final limits since December 12, 1993, the date those limits went into effect. Respondents thus sued Unocal for its continuing violation of the final limits. Additionally, unlike the *Gwaltney* hypothetical, the CDO did not require Unocal to institute an expensive or extreme corrective action that would bring it into immediate compliance with its final limits.[28]

Furthermore, the CDO leaves unclear whether the Board will ever require Unocal to take "extreme corrective action" to bring it into compliance with the final limits, because the CDO allows Unocal to request that the Regional Board further delay its enforcement of the final limits beyond July 31, 1998, and allows Unocal to base that request on no independent evidence. *See* Resp't App. at 97-98. The lower courts' conclusion that Respondents' citizen suit, which seeks Unocal's immediate compliance with, and penalties for violation of, the

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[28] Contrary to Unocal's inflated contention that the CDO required it to spend millions of dollars to implement "groundbreaking" selenium removal technologies (Pet'r Br. at 4, 11, 22), the CDO simply requires Unocal and the five other refiners to engage in a $1.3 million research study over a period of two years to identify a technology that is capable of removing selenium from refinery wastewater and to study biological treatment options for selenium removal. Resp't App. at 95-96. At the completion of the studies, each refiner is to select an appropriate technology for pilot evaluation based upon effectiveness, feasibility and cost. *Id.* at 96-97. After pilot testing, the refiners are accorded at least another two years, until July 31, 1998, to start up the successfully tested technology. *Id.* However, the CDO also provides an escape from these responsibilities: "[i]n the event a discharger is unable by July 31, 1998, to identify or implement a workable removal technology or other control strategy, . . . an extension of the final compliance date will be considered and may be granted based on information regarding technological availability and demonstration of a good faith effort to achieve compliance." *Id.* at 97-98.

final limits, does not duplicate or "supplant" any governmental enforcement action taken against Unocal is consistent with this Court's decision in *Gwaltney*.

3. The Ninth Circuit's Decision Will Not Allow Citizens to Interfere with Government Enforcement of the Clean Water Act.

Unocal sounds a false alarm that the Ninth Circuit's decision will allow citizens unrestricted access to the federal courts to undo settlement agreements reached between the government and permit holders. The Ninth Circuit's opinion does no such thing. The Ninth Circuit properly construed the role Congress created for citizen suits in enforcing the Clean Water Act and correctly placed Respondents' citizen suit within the scheme Congress created for enforcing pollutant discharge permits under the Clean Water Act.

As this Court recognized in *Gwaltney*, the Clean Water Act was enacted in 1972 "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Gwaltney*, 484 U.S. at 52. Because of the enormous national importance of water quality, Congress established a multiple-level enforcement scheme which authorized the states, EPA, and the public to enforce the Clean Water Act. *See* Resp't App. at 2-3. Under this enforcement scheme, permit holders were subject to judicial enforcement proceedings initiated by EPA or the state. 33 U.S.C. §§ 1319, 1342(b)(7), 1365(a). If the state or EPA diligently acted to obtain compliance, then no other enforcement was necessary or allowed. The citizen suit provision reflected a deliberate choice by Congress to widen citizen access to the courts as a supplemental and effective assurance that the Act would be enforced. 33 U.S.C. § 1365; *Gwaltney*, 484 U.S. at 53. As this Court explained in *Gwaltney*, the citizen suit provision's "central purpose [is to permit] citizens to abate pollution when the government cannot or will not command compliance." 484 U.S. at 62.

In 1987, Congress amended the Clean Water Act to provide EPA with the additional option to enforce permit

compliance through the assessment and imposition of administrative penalties against permit violators. 33 U.S.C. § 1319(g). Congress also enacted § 1319(g)(6)(A), which is designed precisely to preclude citizen penalty actions that would be duplicative of an "administrative penalty action." Resp't App. at 6; *Pendleton Woolen Mills*, 11 F.3d at 885-86. It does not preclude citizen suits when EPA or the state agency has merely issued an administrative compliance order, such as the CDO, that does not impose a penalty. *Pendleton Woolen Mills*, 11 F.3d at 885-87; Resp't App. at 13, 62. *See also*, 33 U.S.C. § 1319(g)(6)(A).

The Ninth Circuit's decision placed Respondents' citizen suit within this multi-level scheme Congress created to allow "citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62. It is therefore consistent with *Gwaltney*.

a. The Ninth Circuit's Decision Provides Certainty that Settlement Agreements with Governmental Enforcement Agencies Providing for the Payment of Penalties Will Preclude Citizen Suits.

Unocal repeatedly complains that the Ninth Circuit's decision will dissuade violators from settling administrative penalty actions brought by the government because violators risk being subject to duplicative citizen penalty enforcement. Unocal's complaint is baseless. First, Unocal's argument presumes that the Regional Board brought an administrative penalty action against Unocal for violation of the final permit limits and that the parties settled that action. That is not the case. Instead, Unocal sued the state to invalidate the final limits, and the agreement to settle Unocal's case against the state expressly provided that Unocal's payment was not a penalty. *See* Statement of the Case, Sections B., C., *supra*.

Second, Unocal's argument that the Ninth Circuit's decision will deter regulated businesses and municipalities from settling enforcement actions with states is unrealistic. On the

contrary, the Ninth Circuit's decision will give permit violators greater incentive to settle formal state administrative actions by agreeing to pay penalties, in accordance with statutory criteria and procedures, to avoid subsequent citizen suits.

Third, contrary to Unocal's warning, the Ninth Circuit's decision does not require polluters to fight rather than settle. Instead, it simply makes clear what businesses and municipalities subject to NPDES permits already know – that not all settlements preclude citizen suits, and that they can settle governmental enforcement proceedings and avoid subsequent citizen suits only within the constraints of the Clean Water Act. The Clean Water Act plainly provides that only administrative penalty actions or judicial actions filed by the government preclude citizen penalty actions. 33 U.S.C. §§ 1319(g)(6)(A), 1365(b).[29]

Therefore, if the state or federal government brings an enforcement action against a polluter for violating its permit limits, the polluter can avoid a subsequent citizen suit regarding the same violations by doing one of two things: (1) it can settle with the government under terms that require the polluter to pay a penalty that is assessed after consideration of the penalty factors enumerated in 33 U.S.C. § 1319(g)(3) or the comparable state penalty provision; or (2) the polluter can come into compliance with its permit limits. Unocal did neither.[30]

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[29] Under Unocal's scenario (Pet'r Br. at 23-24), all settlements between the government and a regulated entity would preclude a citizen suit, even if the settlement required the government to pay the polluter. Clearly, this is not what the Clean Water Act states, nor what it intended.

[30] Contrary to Unocal's assertion (*see* Pet'r Br. at 26), the Ninth Circuit's decision in *Knee Deep Cattle Co. v. Bindana Inv. Co., Ltd.*, 94 F.3d 514 (9th Cir. 1996), also makes clear that when permit violators settle with the state under terms that require the violator to pay a penalty, the violator can avoid a subsequent citizen suit. In *Knee Deep*, the state brought an enforcement action against the defendant for violating its permit on various dates in February through May of 1993 and for engaging in a

The lower courts' decisions also make clear, and provide polluters with the certainty, that if they do not pay penalties to the state but instead enter into compliance schedules with the state agency and continue to violate their permit limits in the interim, they do so at the risk of citizen or EPA enforcement. Compliance schedules and negotiated settlements by which the government agrees not to enforce NPDES permits do not and cannot modify or suspend permit limits.[31] If they did, as Unocal suggests, then no polluter would have any incentive to abide by its permit limits. Instead, the polluter could simply defy its permit limits and treat them as opening offers for negotiation toward some less restrictive parameter that does not achieve the water quality objectives of the Clean Water Act. This result would render the entire NPDES permit process superfluous. It also would place at a competitive disadvantage the thousands of businesses and municipalities that have made the efforts and incurred the costs of complying with their permit limits.[32] This clearly is not what Congress intended when it passed the Clean Water Act.

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separate, one-time raw sewage discharge violation on June 2, 1994. 94 F.3d at 515. The defendant paid a $1,400 penalty for the one-time raw sewage discharge, and the state then settled the remainder of its claims by obtaining defendant's agreement to a compliance schedule and foregoing the assessment of penalties for the February through May 1993 violations. *Knee Deep,* 94 F.3d at 515. After the settlement, defendant continued to violate its permit and the state did not assess penalties for those continued violations. *Id.* Accordingly, the Ninth Circuit held that a citizen suit for enforcement of defendant's permit was not precluded by the prior settlement, because the settlement did not require defendant to pay a penalty for the ongoing violation that the citizens sought to enforce. *Id.* at 516-17.

[31] As the district court and Ninth Circuit found, and Unocal does not contest, NPDES permit limits can only be modified in accordance with formal procedures which were not employed by the Regional Board when it issued the CDO. *See* Argument, Section C.3.b., *infra.*

[32] For example, Tosco, Pacific and Chevron also operate refineries that discharge selenium into San Francisco Bay, but those companies are in compliance with their final permit limits. Resp't App. at 4, 27. The record indicates that the crude oil that Unocal refines is cheaper and more rich in

b. The Ninth Circuit's Decision Makes Clear to Unocal What It Must Do to Comply with the Clean Water Act.

Unocal complains that the Ninth Circuit's opinion places Unocal in the uncertain position of being subject to both the final limits and the interim limits. (Pet'r Br. at 12.) This is patently false. The CDO did not modify or suspend Unocal's final permit limits or replace them with a less stringent effluent standard.[33] The Regional Board has no power to extend or "defer" limits contained in an NPDES permit without formally modifying the permit in accordance with mandatory procedures set forth in federal regulations. Resp't App. at 18-19, 37; *Ackels v. United States EPA*, 7 F.3d 862, 864-65 n.1 (9th Cir. 1993). It is uncontested that the Board did not follow those formal procedures. Resp't App. at 19, 37.[34] Contrary to

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selenium than the crude oil that these other refineries process. *See, e.g.*, ER 156-58. Accordingly, Tosco, Pacific and Chevron are placed at a palpable competitive disadvantage to Unocal because they have chosen not to refine that same selenium-rich, cheap crude oil and have implemented techniques to bring their selenium discharges within permitted levels.

[33] Unocal argues that Respondents' lawsuit amounts to a challenge to the CDO and that Respondents should not be able to make this challenge in federal court without first exhausting state administrative remedies. This argument is incorrect. Exhaustion of administrative remedies is not a condition precedent to filing a Clean Water Act citizen suit. 33 U.S.C. § 1365. The only condition precedent to such a suit is service of a 60-day notice letter. § 1365(a); Resp't App. at 18.

Second, Respondents are not challenging the validity of the CDO, which is merely an expression of the Regional Board's decision not to enforce the final limits until at least July 31, 1998. Thus "the [abstention] doctrine is simply not relevant where the federal action is not seeking a ruling on the validity of the state action." Resp't App. at 18. Instead, Respondents are challenging Unocal's failure to comply with the final limits, which the CDO itself states went into effect on December 12, 1993.

[34] Despite Unocal's prior admission that the CDO did not modify or amend Unocal's NPDES permit for selenium discharges (Resp't App. at 17), Unocal now claims that the CDO "deferred" the final permit limits

Unocal's argument, the issuance of a CDO pursuant to California Water Code § 13301 cannot supersede and thereby render superfluous the specific federal requirements for modifying NPDES permits.

Furthermore, in response to public comments and at the December 13, 1993 public hearing on the CDO, the Board stated that it did not intend to modify or revise Unocal's permit. (ER 119, 158.)[35] In fact, the CDO clarifies that the final limits "become effective on December 12, 1993." Resp't App. at 88. Therefore, Unocal is under only *one* permit limit, the final limits contained in Order 91-026, which Unocal has consistently exceeded since December 12, 1993. The Ninth Circuit's conclusion that this citizen suit is necessary to prosecute Unocal for its ongoing violation of the final limits, and that this suit does not supplant governmental enforcement of those limits, is therefore consistent with and supported by this Court's decision in *Gwaltney*.

CONCLUSION

There is no split among the circuit courts or inconsistency between the decision of the Ninth Circuit and any decision of this Court that warrants this Court's review of the Ninth Circuit's opinion affirming the district court's denial of Unocal's Motion to Dismiss Respondents' citizen penalty action. In affirming the district court, the Ninth Circuit made

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until July 31, 1998. (Pet'r Br. at 3-4, 12.) Such a deferment in truth would be a modification by another name.

[35] Even if the Board had intended to extend the final limits until July 31, 1998, it would have transgressed the Clean Water Act. Order No. 91-026 embodies Unocal's Individual Control Strategy for its selenium discharges into San Pablo Bay. *See* Statement of the Case, Section A., *supra*. As mandated by Congress, Unocal was required to comply with Order No. 91-026's final selenium limits by no later than December 12, 1993, to achieve water quality standards. *Id.* Deadlines Congress set in the Clean Water Act may not be modified by governmental agencies. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661-62 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977).

a predominantly factual, case-specific determination that "the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board. Accordingly, because Unocal has not paid a 'penalty,' the § 1319(g)(6)(A)(iii) bar to citizen suits does not apply." Resp't App. at 10. There is no reason for this Court to disturb the lower courts' fact-based determinations. Accordingly, Respondents respectfully request that Unocal's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: December 13, 1996

APPENDIX 1

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, San Francisco Baykeeper, Save San Francisco Bay Association, The Bay Institute of San Francisco, Santa Clara Valley Audubon Society, Kalon Wofford and Anthony Willis, Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Appellant.

No. 95-15139.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 8, 1996.

Decided May 13, 1996.

As Amended July 16, 1996.

Appeal from the United States District Court for the Northern District of California; Thelton E. Henderson, District Judge, Presiding.

Before: BROWNING and JOHN T. NOONAN, Jr., Circuit Judges, and MERHIGE, Senior District Judge.*

MERHIGE, Senior District Judge:

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

This case arises under the federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251, *et seq.* The Appellees, Citizens for a Better Environment, et al. ("CBE"), brought this action in the federal district court for the Northern District of California pursuant to the citizen suit provision of that Act, 33 U.S.C. § 1365. In the Complaint, CBE asserted a claim for violations of the Clean Water Act effluent standards, a claim for violations of Clean Water Act water quality standards, and a state law claim. Although the district court granted the motion of the Appellant, Union Oil Company of California ("UNOCAL"), to dismiss as to the water quality standards claim, the district court denied UNOCAL's motion to dismiss, premised on 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii), as to the effluent standards claim and the dependent state law claim. The district court certified its order denying UNOCAL's motion to dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b).

I.

The Clean Water Act regulates the discharge of pollutants into navigable waters. The Act prohibits all discharge of pollutants except inasmuch as one of several enumerated statutory exceptions applies. 33 U.S.C. § 1311(a). One such exception is where the polluter has been issued a National Pollution Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the prohibition in § 1311(a). Authority to administer the NPDES permit system may be delegated to a state or regional agency where the state or regional regulatory

scheme meets certain criteria. 33 U.S.C. § 1342(b). The entity responsible for issuing permits in the San Francisco Bay area of California is the California Regional Water Quality Control Board, San Francisco Region (the "Regional Board"). Private citizens may bring suit pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

UNOCAL owns and operates a petroleum refinery in the San Francisco Bay area of California. Wastewater from the refinery is subject to UNOCAL's NPDES permit issued by the Regional Board. On February 20, 1991 the Regional Board issued Order No. 91-026, which amended the UNOCAL's NPDES permit for the San Francisco Bay area refinery. The order set a "final" concentration limit on selenium discharges of 50 parts per billion ("ppb") and a mass emission rate of .85 pounds per day, calculated on a running annual average. The final selenium limitation was to take effect December 12, 1993. On June 16, 1991 the Regional Board issued Order No. 91-099 amending UNOCAL's NPDES permit to include an "interim limit" less stringent than the final limit which took effect immediately and which was to remain in force until the final limit came into effect. UNOCAL is in substantial compliance with the interim limit but is not in compliance with the final limit.

The Regional Board issued these orders pursuant to 33 U.S.C. § 1314(*l*) of the Clean Water Act, which required the Regional Board to adopt individual control strategies for discharges into waters determined by the United States Environmental Protection Agency ("EPA") or the

state to be impaired. The Regional Board listed San Francisco Bay as a "hot spot" under § 1314(*l*) on the ground that it failed to meet the "applicable water quality standard" of the Clean Water Act "due entirely or substantially to discharges from point sources of any toxic pollutants." See 33 U.S.C. § 1314(*l*)(1)(B).

The state water board denied an appeal by UNOCAL and other refiners challenging the selenium discharge limits. Shortly thereafter, on October 12, 1992, UNOCAL and others filed a petition for a writ of mandate in the Solano County Superior Court of California seeking to set aside the interim and final limits on the grounds that the Regional Board's listing of the San Francisco Bay as a "hot spot" violated the Clean Water Act and its implementing regulations.

Over the course of 1993, UNOCAL and others were in settlement discussions with the Regional Board. Although other refiners in the area became able to meet the final limits, UNOCAL and other refiners maintained their inability, due to technological constraints, to meet the final selenium limits. On November 8, 1993, UNOCAL, along with other refiners, reached a settlement agreement whereby UNOCAL and others would dismiss the state lawsuit and the Regional Board would adopt a proposed cease and desist order ("CDO"). The parties dispute whether the settlement agreement and proposed CDO were released for public comment on November 9, 1993 or November 12, 1993. On November 19, 1993 and December 15, 1993 public hearings were held on the proposed CDO at which CBE participated. The Regional Board, with some minor modifications, issued the CDO on January 19, 1994 as Order No. 94-015.

The principal elements of the settlement agreement and the CDO were that UNOCAL and the other refiners dismissed their state court lawsuit without prejudice, UNOCAL and others paid the state a total of $2 million ($780,000 of which was contributed by UNOCAL), and the Regional Board issued the CDO which, among other things, relieves UNOCAL and others from meeting the final selenium limit until July 31, 1998. The CDO states, with respect to the latter element, that:

> Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> . . . .
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CBE filed this lawsuit on March 2, 1994. On July 8, 1994, the district court dismissed the water quality standards claim. The district court subsequently certified the question of its denial of the motions to dismiss as to the other claims for immediate appeal pursuant to 28 U.S.C. § 1292(b).

II.

UNOCAL asserts two arguments as to why dismissal of the effluent standards claim is proper. First, UNOCAL argues that dismissal is warranted because the citizen

suit is barred under § 1319(g)(6)(A)(ii) and § 1319(g)(6)(A)(iii). Second, – UNOCAL urges that dismissal for failure to state a claim is appropriate because the CDO issued by the Regional Board had the effect of extending until 1998 the deadline for complying with the final selenium limits specified in the NPDES permit and, thus, there is no effluent standards violation. The Court reviews each of these questions of law de novo. *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir.1989).

A. Is the Citizen Suit Barred Under 33 U.S.C. § 1319(g)(6)(A)(ii) or § 1319(g)(6)(A)(iii)?

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act. 33 U.S.C. § 1319(g)(6) sets out certain instances where these citizen suits are barred. The provisions of § 1319(g)(6)(A) are precisely designed to preclude citizen suits which would be duplicative of an "administrative penalty action." *See Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir.1993).

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, provides, in relevant part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –
>
> > (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the

> EPA] or a State with respect to such a standard or limitation. . . .
>
> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a).

Section 1319(g)(6) provides, in relevant part:

> [A]ny violation –
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under this subsection,
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> >
> > (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6)(A).

1. Applicability of § 1319(g)(6)(A)(iii)

Sec. 1319(g)(6)(A)(iii) precludes this citizen suit if the CDO at issue in this case is a "final order not subject to further judicial review," and if UNOCAL has paid a "penalty" that was "assessed under this subsection, or such comparable State law." Because UNOCAL has not paid a "penalty" "assessed under . . . comparable State law" the Court concludes that CBE's suit is not barred by § 1319(g)(6)(A)(iii).

a. "penalty"

UNOCAL maintains that the $780,000 it paid to the Regional Board constituted a "penalty" within the meaning of § 1319(g)(6)(A)(iii). The district court concluded that the $2 million payment, of which UNOCAL's payment was a part, was not a penalty but "was simply settling the refineries' state court lawsuit." The district court noted that the CDO refers to a "payment" not a "penalty" and that the CDO clearly stated that it was issued pursuant to the Regional Board's authority under California Water Code § 13301, governing cease and desist orders. The district court also noted that in the CDO the Regional Board "expressly declined to invoke its [California Water Code] § 13385 authority" to impose a civil penalty.[1]

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[1] The CDO states, in part, that:

> [t]he Regional Board has considered the various enforcement and penalty options available to it regarding the violation [of the NPDES permit],

UNOCAL argues, essentially, that it has paid out over $780,000 (10% of which went into the California Water Pollution Cleanup and Abatement Account that is the repository of fines levied pursuant to § 13385, and 90% into a "Selenium Mitigation Fund")[2] and that it elevates form over substance to call this anything other than a "penalty."

In support of the formal reasoning of the district court, CBE asserts two additional reasons why UNOCAL may not characterize the payment as a penalty. First, UNOCAL itself insisted on characterizing the financial transfer as a "payment" and not a "penalty" at the time of the state action settlement. CBE notes that counsel for UNOCAL stated at the hearing on the motion to dismiss at the district court that UNOCAL would not, at the time of the settlement of the state lawsuit, "sign on to paper-work that characterized it as a penalty, because of the punitive and bad conduct implications that the general public takes from that term." CBE, appropriately, in the Court's view, argues that UNOCAL simply "cannot have it both ways" and that the fairest characterization of the

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including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

[2] The Appellees argue, however, that this cuts against the Appellant because § 13385 requires all penalties to be paid into the California Water Pollution Cleanup and Abatement Account.

$780,000 payment is that it was not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action.

Second, CBE argues that there are other significant advantages that were obtained by UNOCAL by making a payment independent of the state statutory provision, California Water Act § 13385, that is analogous to the administrative penalty provision of the Clean Water Act, 33 U.S.C. § 1319(g). California Water Code § 13385 sets out formal procedures to be followed and specific factors to be considered in setting a penalty. Thus, asserts CBE, by making a payment outside the context of § 13385, UNOCAL avoided a significant level of scrutiny as to the nature and amount of a penalty. For example, the United States, as *amicus curiae*, notes that there was no formal scrutiny of the economic benefits to UNOCAL of non-compliance and thus no assurance that UNOCAL has fully disgorged the benefit it receives from violating effluent standards. CBE also notes that while payment of an administrative penalty must be made within 30 days of being imposed, California Water Code § 13323(d), UNOCAL was not required to make half of its payment until a year after the settlement was entered into.

The Court determines that the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board. Accordingly, because UNOCAL has not paid a "penalty," the § 1319(g)(6)(A)(iii) bar to citizen suits does not apply. This conclusion that § 1319(g)(6)(A)(iii) is not implicated is buttressed by the Court's interpretation of the term "comparable state law," discussed below.

b. "comparable state law"

Having determined that the payment at issue was not a "penalty," the district court also concluded that the payment was not "assessed under this subsection, or such comparable State law" within the meaning of § 1319(g)(6)(A)(iii). It is undisputed that the penalty provision in § 13385 of the California Water Code is comparable to the federal Clean Water Act penalty provision of 33 U.S.C. § 1319. It is also not disputed that the payment at issue in this case was not levied pursuant to California Water Code § 13385.[3] The key issue, therefore, is whether a penalty assessed not in accordance with § 13385 but, instead, under the aegis of a related provision of the California statutory scheme is "assessed under this subsection, or such comparable State law." UNOCAL argues, as it did in the district court, that although the CDO states that it was issued under the authority of California Water Code § 13301, because § 13301 is within the same statutory scheme as § 13385 a penalty assessed under the former provision is assessed under a "comparable State law" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

The district court held that the "comparability assessment is conducted by examining the state statutory enforcement provision involved," here California Water Code § 13301, and "not the state statutory enforcement scheme as a whole." Because California Water Code

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[3] Although the parties dispute the degree of similarity to the requirements of § 13385 of the procedures and factors that were actually taken and considered in this case, Appellant cedes that the specific requirements of § 13385 were not adhered to.

§ 13301 is not comparable to the federal penalty provision in 33 U.S.C. § 1319(g), reasoned the district court, a penalty assessed under § 13301 does not implicate the § 1319(g)(6)(A)(iii) bar on citizen suits. In reaching this conclusion the district court specifically rejected the reasoning of the First Circuit in *North and South Rivers Watershed Ass'n v. Scituate* interpreting the term "comparable" in § 1319(g)(6)(A)(ii). 949 F.2d 552, 555-556 (1st Cir.1991).

In *Scituate* the First Circuit held that the comparability requirement of § 1319(g)(6)(A)(ii) is met where the state "statutory scheme" contains a penalty provision comparable to the federal penalty provision and that a state's decision not to utilize the comparable state law penalty provision in any particular case does not negate the "comparability" of the state action. *Id.*; accord, *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 382-383 (8th Cir.1994). The *Scituate* Court reasoned:

> The State's decision not to utilize the penalty provisions does not alter the comparability of the State Act's statutory scheme to the scheme found in the Federal Act. While the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision, another section of the same statute does contain penalty provisions. These two coordinate parts are cogs in the same statutory scheme implemented by the State for the protection of its waterways.

Scituate, 949 F.2d at 556, (internal citations omitted). Thus, "[i]t is enough that the [state] statutory scheme . . . contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two

acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* Furthermore, according to the *Scituate* Court, "[s]o long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act." *Id.*

In *Washington Public Interest Research Group v. Pendleton Woolen Mills* this Court interpreted the terms of 33 U.S.C. § 1319(g)(6)(A)(i). 11 F.3d 883 (9th Cir.1993). The Court noted that § 1319(g) deals only with administrative penalty actions. *Id.* at 885. The Court then concluded that when determining whether the EPA was "diligently prosecuting an action under this subsection," the phrase "under this subsection" could mean only that the EPA was prosecuting an administrative penalty action. *Id.* at 886. The § 1319(g)(6)(A)(i) bar to citizen suits, therefore, was not implicated "in the face of an administrative compliance order." *Id.* The Court specifically noted that it was not persuaded by the reasoning underlying the *Scituate* Court's interpretation of § 1319(g)(6)(A)(ii) which was grounded in that court's concern that the discretion of enforcement authorities to choose enforcement methods be preserved. *Id.* This Court noted the language of the statute was clear and that there was no evidence in the legislative history that suggested that Congress intended to extend the bar on citizen suits to a context beyond administrative penalty actions. *Id.* at 885-886. This Court also noted that had Congress intended that administrative compliance orders preclude citizen suits, it could have done so – as it has in other instances. *Id.* at 886.

The Court concludes that the requirement in § 1319(g)(6)(A)(iii) that any penalty be "assessed under this subsection, or such comparable State law" before it precludes citizen suits means that the penalty at issue must have been assessed under that provision of state law that is comparable to § 1319(g). There are several reasons for this conclusion. First, this is the plainest reading of the statutory language.[4] Second, § 1319(g) mandates various public notice and comment procedures as well as penalty assessment factors. Unless any penalty is assessed according to the particular provision of state law that is comparable to § 1319(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude. Third, as noted by the United States in its amicus brief, the holding of *Scituate* leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA. Nothing in the language and structure of the § 1319(g)(6)(A) in

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[4] As the Supreme Court has stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney*, 484 U.S. at 56, 108 S.Ct. at 381, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S.Ct. at 2056. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

any way suggests that Congress intended such a dichotomy. Nor has the UNOCAL pointed to any legislative history that would indicate that Congress intended that state administrative actions be given broader preclusive effect than the administrative actions of the EPA.

2. Applicability of § 1319(g)(6)(A)(ii)

Sec. 1319(g)(6)(A)(ii) precludes this citizen suit if the State "has commenced and is diligently prosecuting an action under a State law comparable to this subsection."

The district court concluded that the § 1319(g)(6)(A)(ii) bar was inapplicable for two reasons. First, the district court concluded that the action at issue was not taken "under a State law comparable to this subsection." Additionally, the district court concluded that "because of the entry of the settlement agreement and the CDO, the Regional Board's enforcement action is no longer still being 'prosecuted' within the meaning of § 1319(g)(6)(A)(ii)."

UNOCAL has made no contention in its briefs as to why the district court erred in concluding that the action was no longer being "prosecuted" within the meaning of § 1319(g)(6)(A)(ii).[5] It seems plain that no action *is* being prosecuted at this time. Thus, § 1319(g)(6)(A)(ii) is inapplicable. Furthermore, the Court concludes, for the reasons discussed above with respect to § 1319(g)(6)(A)(ii),

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[5] Indeed, the Appellant raised this provision in the district court only in a footnote of its briefs and it was dealt with by the district court in a footnote to its decision.

that the district court did not err in concluding that the Regional Board's action was not taken "under a State law comparable to this subsection."

B. Did the Regional Board's Cease and Desist Order Effectively Defer the Compliance Date for Selenium Discharges so that UNOCAL is not "in Violation" of an Effluent Standard or Limitation?

UNOCAL asserts that CBE has failed to state a claim because the facts it alleges do not constitute a "violation of an effluent standard or limitation" within the meaning of § 1365(a)(1)(A) because the CDO issued by the Regional Board had the effect of modifying UNOCAL's NPDES permit to extend until 1998 the deadline for complying with the final selenium limit.

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act.[6]

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[6] Section 1365 provides, in part, that:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –
>
> > (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation. . . .

33 U.S.C. § 1365.

"Effluent standard or limitation" means "an effluent limitation or other limitation under section 1311" or "a permit or conditions thereof issued under section 1342 [the NPDES provision] of this title." 33 U.S.C. § 1365(f). Thus, violation of the limits specified in an NPDES permit is a violation of "an effluent standard or limitation" within the meaning of § 1365.

The district court concluded that the issuance by the Regional Board of the CDO extending the compliance schedule was akin to an exercise of prosecutorial discretion and did not suspend the limits and deadlines contained in the NPDES permit or shield UNOCAL from this citizen suit. While UNOCAL concedes that the CDO did not purport to modify the NPDES permit and did not constitute a formal amendment or modification of the NPDES permit,[7] it argues that the CDO did have the practical effect of modifying the compliance date contained in the NPDES permit. For the first time on appeal, UNOCAL also argues that the district court was foreclosed, under either the doctrine of exhaustion of remedies or the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), from addressing the argument that the CDO issued by the Regional Board failed to effectively modify the NPDES compliance date because California law provided CBE a right, of which they did not avail themselves, to review of the CDO by

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[7] There are specific, mandatory procedure for NPDES permit modification. Cal.Code Regs. Tit. 23, § 2235; 40 C.F.R. § 122.62. *See also Ackels v. U.S.E.P.A.*, 7 F.3d 862, 864, n. 1 (9th Cir.1993). It is undisputed that these procedures were not followed in this case.

appeal to the state water board or by judicial review in state court. California Water Code §§ 13320, 13330.

The Court concludes that the federal courts are not precluded from addressing the issue of whether the CDO effectively modified the NPDES compliance date. While it is true that there, were procedures available for CBE to appeal the CDO within the state system, this action does not challenge the validity of the CDO but rather seeks to enforce the requirements of the Clean Water Act. Furthermore, 33 U.S.C. § 1365 makes no mention of exhaustion of state remedies as a prerequisite for bringing a citizen suit. Similarly, *Younger* abstention is not appropriate. There are three requirements for the invocation of *Younger* – ongoing state proceedings, implication of an important state interest in the state proceedings, and an adequate opportunity to raise federal questions in the proceedings. *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079 (9th Cir.1987). While failure to exhaust state appellate remedies may satisfy the requirement that there be ongoing state proceedings, *Id.*, the doctrine is simply not relevant where the federal action is not seeking a ruling on the validity of the state action.

The Court further concludes that the CDO at issue did not modify, effectively or otherwise, the terms of UNOCAL's NPDES permit. This conclusion is appropriate for the following reasons.

First, the CDO does not purport to modify the NPDES permit. In the Findings to the CDO, the Regional Board states in paragraph 4 that "[t]he effluent limitations imposed under Order No. 91-026 [amending the NPDES permit to include the final selenium limits]

become effective on December 12, 1993. . . . The Regional Board is adopting this Order to enforce the provisions of Order No. 91-026." Thus, the Regional Board did not intend to modify the Permit but instead worked out a compliance schedule wherein, according to paragraph 7 of the CDO, if "the dischargers have failed to comply with the provisions of this Order [the official may . . .] request the Attorney General to take appropriate action against the dischargers, including injunctive and civil remedies, if appropriate, or to issue a Complaint for Board consideration of Administrative Civil Liabilities." Thus, the language of the CDO itself fits with the conclusion that the CDO was an exercise of prosecutorial discretion.

Second, as noted above, federal and state regulations govern the modification of NPDES permits. It is not disputed that these regulations were not followed in this case. These regulations, both procedural and substantive, ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities. For instance, there are public notice requirements for a permit modification process that are different than those required in an enforcement action. Further, there is a five year duration on the life of an NPDES permit that the "effective modification" asserted here would violate. § 1342(b)(1)(B).

Third, even if the CDO were to be construed as having effectively extended the compliance date in the NPDES permit, such a modification would likely run afoul of the substantive constraint on the ability of regulators to modify permits found in 33 U.S.C. § 1342(*o*) (the "anti-backsliding" provision). This provision prohibits,

with certain narrow exceptions,[8] any modified permit from containing "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." UNOCAL asserts that the "effective" modification of the permit under consideration would not violate the anti-backsliding provision because the permit contained interim limits which would remain in full effect until the final limits actually took effect. Essentially, argues UNOCAL, the final limits have never taken effect so they cannot be backslided on. This argument seems to assume that effluent standards are not effectively part of the NPDES permit until they take effect. It appears to the Court, however, that a modified NPDES permit that does not contain a strict effluent limitation that had been about to come into effect is, indeed, "less stringent" than the previous, unmodified NPDES permit – regardless of whether the limitation had yet taken effect.

III.

For the foregoing reasons, the district court's denial of UNOCAL's motion to dismiss is **AFFIRMED.**

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[8] Appellant has asserted that two such exceptions are applicable. Appellant asserts that "new information is available" that "would have justified" a less stringent standard under § 1342(*o*)(2)(B)(i) and that there is no "reasonably available remedy" under § 1342(*o*)(2)(C). Because it is not necessary so to do, the Court does not comment on the applicability of these exceptions.

APPENDIX 2

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

UNION OIL COMPANY OF CALIFORNIA, Defendant.

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

EXXON COMPANY USA, Defendant.

Nos. C 94-0712 TEH, C 94-0713 TEH.

United States District Court, N.D. California.

July 8, 1994.

THELTON E. HENDERSON, Chief Judge.

The two above-captioned related cases are identical citizen suits brought by non-governmental environmental conservation organizations against defendant oil companies. The suits challenge each defendant's discharge into portions of the San Francisco Bay of waste water containing the chemical selenium from oil refineries owned by each defendant located in the San Francisco Bay area. The first suit is brought against defendant Union Oil Company of California ("Unocal") and concerns Unocal's refinery at Rodeo, California, which discharges waste water containing selenium into the San Pablo Bay. The second is against the Exxon Corporation

("Exxon") and concerns Exxon's refinery at Benicia, California, which discharges selenium into Suisan Bay. Plaintiffs allege that the selenium levels in the effluent discharged from Unocal and Exxon's refineries violate the federal Water Pollution Control Act ("Clean Water Act" or "Act"), 33 U.S.C. § 1251 *et seq.*

Defendants Unocal and Exxon have moved to dismiss the suits on several grounds. In addition, Exxon has moved that the suit against it be dismissed on the ground that venue over that case properly lies in the U.S. District Court for the Eastern District of California. Oral argument on these motions was heard by the Court on June 6, 1994. After consideration of the parties' written and oral arguments, the Court rules that venue in the suit against Exxon, *Citizens for a Better Environment-California v. Exxon*, No. C 94-0713 TEH, indeed lies in the Eastern District and therefore ORDERS that the case be TRANSFERRED from this Court to the U.S. District Court for the Eastern District of California. As for the suit against Unocal, the Court DENIES Unocal's motion to dismiss. The reasons for these rulings are set forth in the memorandum opinion and order that follows.

I. BACKGROUND

In these two actions brought pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, the plaintiff environmental groups seek to enforce effluent discharge standards and deadlines contained in certain pollution permits issued to defendants Unocal and Exxon pursuant to the Clean Water Act. These suits are undertaken in the face of an administrative order, issued

by a state agency charged with enforcing the Clean Water Act, which purports to grant defendants a five-year extension of the deadline by which they must come into compliance with the pollution discharge standards contained in their permits. The issue central to these motions is what effect the state administrative order has on the enforceability of the standards contained in defendants' pollution permits.

A. THE REGULATORY FRAME-WORK

The Clean Water Act regulates the discharge of pollutants into navigable waters. The statute is structured such that all discharge of pollutants is prohibited except insofar as one of several enumerated statutory exceptions applies. *See* 33 U.S.C. § 1311(a). One such exception obtains where a polluter has been issued a permit pursuant to the National Pollution Discharge Elimination System ("NPDES permit" or "permit"), authorizing it to discharge designated pollutants at certain levels subject to certain conditions. *See* 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33 U.S.C. § 1311(a). Private parties may bring citizen suits pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

The Act provides that, in any given state or region, authority to administer the NPDES permitting system can be delegated by the federal Environmental Protection

Agency ("EPA") to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. *See* 33 U.S.C. § 1342(b). In California, EPA has granted authorization to a state regulatory apparatus, comprised of the State Water Resources Control Board ("State Board") and several subsidiary Regional Water Quality Control Boards, to issue NPDES permits. The entity responsible for issuing NPDES permits and otherwise regulating discharges in the region at issue in these cases is the California Regional Water Quality Control Board, San Francisco Region ("Regional Board" or "Board").

B. HISTORY OF UNOCAL AND EXXON'S NPDES PERMITS

Exercising its delegated authority under the Clean Water Act, the Regional Board in 1989 and 1990 issued NPDES permits for Unocal, Exxon, and four other Bay Area oil refineries, specifying certain limits on the amount of pollutants that the refineries could discharge into the San Francisco Bay and its estuary ("Bay"). Selenium, a toxic element, occurs in high concentrations in the relatively low grade crude oil from the San Joaquin Valley that is refined at the six Bay Area refineries. Selenium passes through the refineries and is present in the wastes that they discharge into the Bay.

The 1987 Amendments to the Clean Water Act required states to identify a list of navigable waters for which water quality standards established under the Act

were unlikely to be achieved "due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to [33 U.S.C. § 1317(a)]." 33 U.S.C. § 1314(*l*)(1)(B). Selenium has been listed by EPA as a toxic pollutant pursuant to this code section. *See* 40 C.F.R. § 401.15. As part of such listing, the state must identify the point sources causing selenium pollution in the listed waters and develop an "individual control strategy" ("ICS") to control each point source so as to achieve the water quality objectives for such waters "as soon as possible, but not later than 3 years after the date of the establishment of such strategy." 33 U.S.C. §§ 1314(*l*)(1)(C), (D).

On February 3, 1989, when the California Water Resources Control Board published its list required pursuant to the 1987 Clean Water Act Amendments, the State Board did not identify several portions of the upper San Francisco Bay Estuary – San Pablo Bay, Carquinez Strait, and Suisan Bay – as "toxic hot spots" for selenium, nor did it specify oil refinery selenium discharges as a substantial cause of selenium pollution in the Bay. EPA took issue with these omissions, among other things. Exercising its regulatory authority under the Clean Water Act, EPA issued a final listing on September 28, 1990, designating these portions of the Bay as "impaired waters" due to selenium pollution, and attributing that selenium substantially to the discharges from the six Bay Area refineries: Unocal's refinery in Rodeo, Exxon's refinery in Benicia, Shell Oil Company's manufacturing complex in Martinez, Tosco Corporation's refinery in Avon, Chevron U.S.A.'s refinery in Richmond, and Pacific Refining Company's facility in Hercules. EPA stated that it disapproved

of the ICS's then in effect for Unocal, Exxon, and the other dischargers, and made known its intention to issue its own ICS's not later than December 31, 1990, which would require compliance with specified effluent limits, calculated based on state water quality standards, within three years of the date of issuance.

Responding to EPA's rebuke, on February 20, 1991, the Board issued an order listing San Pablo Bay, Carquinez Strait, and Suisan Bay as "hot spots" under 33 U.S.C. § 1314(*l*), and amending Unocal, Exxon, and the other refineries' NPDES permits to specify certain concentration – and mass-based limits on the amount of selenium that each refinery could discharge. By the terms of the amended permits, these new limits ("final limits") would become effective on December 12, 1993. On June 16, 1991, the Board issued an additional order, amending the permits of Unocal, Exxon, and the other refineries to include interim selenium discharge limits ("interim limits"), significantly less stringent than the final limits. The interim limits went into effect immediately on that date and were to remain in force until the final limits took effect.

C. STATE COURT LAWSUIT BY REFINERIES

Unocal, Exxon, and the other Bay Area refineries sought unsuccessfully to challenge the Regional Board's listing of San Pablo Bay, Carquinez Strait, and Suisan Bay as impaired waters, each filing applications for review with the State Water Resources Control Board. On October 16, 1992, shortly after those applications were dismissed by the State Board, the Bay Area refineries and

their trade association, the Western States Petroleum Association ("WSPA"), filed a petition for writ of mandate in Solano County Superior Court seeking to set aside the Regional Board's orders imposing the final limits and the interim limits on the ground that the listing of the above-noted regions of the Bay as impaired bodies of water was in violation of various provisions of the Clean Water Act and of EPA administrative regulations promulgated under the Act.

D. SETTLEMENT OF LAWSUIT AND REGIONAL BOARD ENFORCEMENT ACTION

The refineries and WSPA did not press for a hearing on the merits of their state court suit but instead initiated settlement negotiations with the Regional Board and the California Attorney General's Office, which proceeded over the course of 1993. Three of the Bay Area refineries, Chevron, Tosco, and Pacific Refining, reduced their discharge levels, such that they would be in compliance with the final limits when they took effect. Unocal, Exxon, and Shell, however, contended that they could not comply with the final limits. Although the other three refineries had succeeded in reducing their effluent levels to meet the final limits, Unocal, Exxon, and Shell maintained that, due to technological constraints, they could not reduce their selenium discharge levels sufficiently to comply with the final limits scheduled to take effect on December 12, 1993.

On November 8, 1993, the six refineries, the state, and the Regional Board agreed on a settlement pursuant

to which the refineries and WSPA would consent to dismissal of their state court action, and the Board would issue a Cease and Desist Order ("CDO"). The Board published the proposed settlement and CDO in the days that followed, and noticed public hearings on them.

The principal terms of the settlement were that the three refineries that had not complied with their final selenium limits – Unocal, Exxon, and Shell – would receive a nearly five year extension until July 31, 1998 of their deadline for complying with their final limits, and in exchange would pay the state $2 million and, along with the other refineries, would drop their state court action. Oddly, however, neither the settlement agreement nor the CDO expressly state that Unocal, Exxon, and Shell are relieved from having to comply with the final limits contained in their NPDES permits until July 31, 1998. Rather, the CDO effects this purported extension by providing that Unocal, Exxon, and Shell

> shall cease and desist from discharging waste in violation of [their NPDES permits] by complying with the following:
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> * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
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> * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge

> limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CDO at 7. The settlement agreement stated that the above-quoted provision of the CDO "effectively modified" the deadlines specified in defendants' NPDES permits for complying with the final selenium limits. The CDO also provided that Unocal, Exxon, and Shell would implement a study to identify technologies for reducing selenium discharge levels, and would carry out pilot tests and source reduction studies.

The terms of the settlement agreement dismissing the refineries' state court suit specified that the dismissal was to be "without prejudice" and expressly provided that nothing in the agreement waived the refineries' right to challenge the validity of the final limits contained in their NPDES permits. The refineries agreed only to refrain from challenging the final limits unless and until the refineries should find in 1998 that they are unable to identify or implement a workable removal technology or other control strategy that would enable them to meet the limits, and the Board declines to extend the July 31, 1998 deadline further. Thus, in effect, the refineries merely agreed to drop their challenge to the final limits so long as the limits are not being enforced, but retained the right to challenge them once they are.

On November 19, 1993, and December 15, 1993, public hearings on the CDO were held at which the instant plaintiffs and other members of the public testified. The Board made some minor modifications to the CDO in response to comments received from the public and from

EPA, and issued a final CDO on January 19, 1994. Plaintiffs filed these lawsuits on March 2, 1994.

II. LEGAL STANDARD

Dismissal is appropriate under Fed.R.Civ.P. ("Rule") 12(b)(6) when a plaintiff's complaint fails to state a claim upon which relief can be granted. The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Dodd v. Spokane County*, 393 F.2d 330, 334 (9th Cir.1968); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). Unless the Court converts the Rule 12(b)(6) motion into a motion for summary judgment, the court may not consider material outside of the complaint. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir.1981). However, "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986). Matters of public record include court and agency orders and agency regulations. *Id.* Thus, this Court may take judicial notice on this motion of rulings and regulations issued or published by the Regional Board or by EPA, regardless whether such documents were filed as attachments to the complaint.

The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears to a certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."

Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569 (9th Cir.1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2288, 90 L.Ed.2d 729 (1986). However, legal issues on which the actionability of the claim depends can and should be resolved at this stage. Dismissal is appropriate if, as a consequence of such resolution, the court determines that, as a matter of law, the complaint's allegations fail to state a claim.

Dismissal is appropriate under Rule 12(b)(3) where venue in a case does not properly lie in the court in which it is filed. However, where the court deems it to be "in the interest of justice," the court may instead transfer an improperly venued case to a court in which it could have been brought. 28 U.S.C. § 1406(a).

III. DISCUSSION

In their complaints in each of these two related cases, plaintiffs allege three causes of action: that defendant has not complied with an applicable effluent standard or limitation – to wit, the final selenium limits and accompanying compliance deadline contained in their NPDES permits – in violation of the Clean Water Act, 33 U.S.C. § 1311(a); that defendant has not complied with an applicable water quality standard, also in violation of the Clean Water Act; and that defendant has engaged in an unfair business practice in violation of California Business & Professions Code § 17200 *et seq.*

As to the first cause of action, defendants contend that the CDO issued by the Regional Board properly extended the deadline by which defendants are required to comply with the selenium discharge limits specified in

their NPDES permits, such that their present failure to meet that limit does not violate the federal Clean Water Act. Alternatively, defendants argue that, in any event, plaintiffs may not bring a citizen suit to enforce the effluent standards specified in defendants' NPDES permits because the Regional Board has already taken enforcement action as to that violation and defendants have paid a penalty, thereby precluding a parallel citizen enforcement suit under 33 U.S.C. § 1319(g)(6)(A)(iii). Finally, defendants charge that plaintiffs' suits are barred for failure to satisfy the notice requirements imposed under 33 U.S.C. § 1365(b)(1)(A) for citizen suits.

As to the second cause of action, defendants urge that water quality standards – as distinct from effluent standards – are not enforceable in citizen suits under the Clean Water Act and that the count must consequently be dismissed. As for the third cause of action, defendants contend that dismissal of the first two claims necessitates dismissal of the third state law claim as well. Finally, defendant Exxon charges that the suit against it must be dismissed for improper venue since its refinery is not located within the geographic area for which venue properly lies in this Court.

A. VENUE IN *CITIZENS FOR A BETTER ENVIRONMENT V. EXXON*

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, under which plaintiffs have brought these suits, contains a special venue provision stating that

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an

> order respecting such standard or limitation may be brought under this section *only* in the judicial district in which such source is located.

33 U.S.C. § 1365(c)(1) (emphasis added). As is clear on the face of the complaint, Exxon's refinery is located in the City of Benicia, *see* Complaint ¶ 9, which is within the County of Solano. Solano County is in the geographic region covered by the U.S. District Court for the Eastern District of California, not this Court. 28 U.S.C. § 84(b). The Eastern District is therefore the only district in which venue is proper under the Act. On this basis, Exxon urges that the Court dismiss the suit for improper venue pursuant to Rule 12(b)(1). Conceding this venue error in their opposition papers, plaintiffs urge that the Court transfer the case to the Eastern District rather than dismiss it.

28 U.S.C. § 1406(a) instructs that:

> The district court of a district in which is filed a case laying venue in the wrong . . . district shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought.

Whether the interest of justice militates in favor of transfer rather than dismissal is a judgment committed to the sound discretion of the district court. "[T]ransfer is generally . . . consistent with the 'interest of justice' . . . because it eliminates the delay and additional expense associated with reinstituting suit in another forum." *Banque de la Mediterranee-France, S.A. v. Thergen, Inc.*, 780 F.Supp. 92, 95 (D.R.I.1992). On the facts of this case, the Court holds that transfer rather than dismissal is appropriate. Accordingly, it is hereby ordered that *Citizens for a Better Environment-California v. Exxon*, No. C 94-0713 TEH, shall be

TRANSFERRED FORTHWITH from this Court to the U.S. District Court for the Eastern District of California. In view of this ruling, the remainder of this opinion and order shall address only the motion to dismiss filed by the defendant in the Unocal case.

B. FIRST CAUSE OF ACTION: VIOLATION OF EFFLUENT STANDARD OR LIMITATION

Under the Clean Water Act, dischargers are strictly liable for any violation of the terms of an NPDES permit. *California Public Interest Research Group v. Shell*, 840 F.Supp. 712, 714 (N.D.Cal.1993). As explained above, the Act authorizes private parties to bring citizen suit enforcement actions, and provides, in pertinent part, that such actions may be brought against

> any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the Act].

33 U.S.C. § 1365. *See* 33 U.S.C. § 1365(f) (defining "effluent standard or limitation"). As noted above, the definition of "effluent standard[s] or limitation[s]" for which violations are actionable under this section includes effluent standards or limits prescribed in NPDES permits, since violation of such limits places a polluter in violation of 33 U.S.C. § 1311(a). Additionally, violations of terms contained in NPDES permits are generally enforceable of their own accord in citizen suits. *See* 33 U.S.C. § 1365(f)(6).

There is no dispute that on December 12, 1993 – the date the final selenium limits took effect under Unocal's NPDES permit – and every day since then, Unocal's

discharges of selenium have exceeded the daily limits under its NPDES permit. Rather, Unocal contends that plaintiffs' citizen suit should be dismissed on the grounds: (1) that the CDO issued by the Regional Board properly extended the deadline by which defendant is required to comply with the final selenium discharge limits specified in its NPDES permit, such that the deadline specified in its permit is no longer in effect; (2) that, in any event, the citizen suit is barred under 33 U.S.C. § 1319(g)(6)(A)(iii) because the state agency charged with enforcing the Act, acting pursuant to a "comparable" state law, has already issued a "final order" regarding the violation, assessing a "penalty" against Unocal which Unocal has paid; and (3) that plaintiffs have failed to satisfy the notice requirements for a citizen suit. Each of these objections, if correct, would provide an independently adequate basis for dismissing plaintiffs' suit. Thus, in order to avoid dismissal, plaintiffs must establish that none of these objections is well-founded.

1. WHETHER, ON THE MERITS, THERE IS NO VIOLATION OF UNOCAL'S NPDES PERMIT BECAUSE THE REGIONAL BOARD'S CDO VALIDLY EXTENDED THE COMPLIANCE DEADLINE CONTAINED IN UNOCAL'S PERMIT

Unocal's first argument for dismissing plaintiffs' claim under the Clean Water Act seeking to enforce compliance with an effluent standard or limitation – plaintiffs' first cause of action – is that, on the merits, Unocal has not violated its NPDES permit because the CDO issued by the Regional Board validly extended until 1998

the deadline for complying with the final selenium limit specified in the NPDES permit.[1] As recounted above, pursuant to the settlement reached by the Regional Board, the State Attorney General's Office, and the Bay Area oil refineries in late 1993, the Regional Board issued a CDO containing several terms that had been agreed to in the settlement. The CDO provided, in pertinent part:

> IT IS HEREBY ORDERED, pursuant to Section 13301 of the California Water Code, that Shell Oil Company, Union Oil Company of California, and Exxon Company, U.S.A. shall cease and desist from discharging waste in violation of Order No. 91-026 [– the order amending the refineries'

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[1] Unocal labels this argument a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), reasoning that if the NPDES limits are effectively suspended such that Unocal has not violated an effluent limit, then this Court lacks subject matter jurisdiction, for 33 U.S.C. § 1365(a) confers jurisdiction over citizen suits against polluters only where violations of effluent standards or other orders exist. However, the Supreme Court has held that, generally, assertion of a claim under a federal statute "alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the [statute] does provide the claimed rights." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959). In such cases, a finding of no statutory violation results in dismissal for failure to state a claim rather than for lack of jurisdiction. The Court will therefore treat Unocal's argument here as a motion to dismiss for failure to state a claim. Ultimately, however, the label affixed to the motion is unimportant. Regardless whether dismissal on such grounds is correctly characterized as based on absence of jurisdiction or failure to state a claim, in both cases it hinges on the same legal question: whether the Board's action, as a matter of law, suspended the final limits and deadline contained in Unocal's NPDES permit.

> NPDES permits to impose final selenium discharge limits –] by complying with the following:
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> * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limits specified in Order No. 91-026 and shall comply with these limits, no later than July 31, 1998.

CDO at 7.

Unocal concedes both (1) that the CDO did not purport to modify Unocal's NPDES permit, and (2) that even if it did purport to do so, such a modification would not have been valid. Any such putative modification would have been invalid for three reasons. First, modifications to NPDES permits must be implemented in accordance with standards and procedures specified in federal agency regulations which were not followed here.[2] Second, even if a purported modification had been procedurally proper, it would have violated a substantive

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[2] The procedures for NPDES permit modification are mandatory. Cal.Code Regs. tit. 23, § 2235; 40 C.F.R. § 123.25(a)(22); *Ackels v. U.S. E.P.A.*, 7 F.3d 862, 864 n. 1 (9th Cir.1993); *United States v. Metropolitan District Commission*, 16 Envtl.L.Rep. 20621, 20624, 1985 WL 9071 (D.Mass.1985). Unless properly modified in accordance with these procedures, the

requirement of the 1987 Clean Water Act Amendments which establish a three-year deadline for a polluter's coming into compliance with water quality standards imposed pursuant to 33 U.S.C. § 1314(*l*)(1)(D), such as those contained in Unocal's NPDES permit.[3] The three-year deadline for Unocal and the other refineries' permits

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permit as originally issued remains in effect, and violations of the permit may be subject to a citizen enforcement suit. *Public Interest Research Group v. Yates Industries*, 757 F.Supp. 438, 445 (D.N.J.1991); *Metropolitan District Commission*, 16 Envtl.L.Rep. at 20624, 1985 WL 9071.

First, the enforcement agency modifying the permit must make a finding of cause appropriate for modifying the permit. 40 C.F.R. §§ 122.41(f), 122.62, 122.63. The Regional Board made no such finding in this case. Second, the enforcement agency must prepare a draft permit and issue a fact sheet setting forth the significant factual, legal, methodological, and policy questions considered in preparing the draft permit, or take other mandatory steps to ensure careful assessment of alternatives. 40 C.F.R. §§ 124.6, 124.8(a), 124.10, 124.11, 124.12, 124.56. The Regional Board did not follow these procedures in this case. Furthermore, the Board's notice of hearing on the CDO makes no reference to a permit modification, further indicating that the Board did not purport to be modifying the refineries' permits.

[3] As discussed above, 33 U.S.C. § 1314(*l*)(1)(D) requires that individual control strategies (ICS's) be adopted in order to achieve reduction in pollution levels in certain waters designated pursuant to 33 U.S.C. § 1314(*l*)(1)(D). An ICS must impose limits on toxic pollutants sufficient to attain water quality standards within three years. 33 U.S.C. § 1314(*l*)(1)(D); 40 C.F.R. § 123.46; *Westvaco Corp. v. U.S. E.P.A.*, 899 F.2d 1383, 1385 (4th Cir.1990). To that end, Unocal's NPDES permit compelled it to reduce selenium discharges to meet certain limits by December 12, 1993, which was within three years of the February 20, 1991 issuance of the Board's order amending the permit to impose the final selenium limits.

was triggered, at the very latest, on February 20, 1991, when the Board issued its order amending the NPDES permits to include the final selenium limits. In light of that fact, any ruling purporting to extend the compliance deadline beyond February 20, 1994 would violate the statutory three-year deadline. Third, any purported modification to Unocal's permit would have violated another substantive requirement of the 1987 Clean Water Act Amendments, the "anti-backsliding" provision, which forbids permits of the type held by Unocal from being "renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," subject to certain exceptions. 33 U.S.C. § 1342(*o*)(1).[4]

Rather than contending that its permit was "modified" by the CDO, Unocal argues instead that a deadline for complying with effluent standards specified in an NPDES permit may permissibly be extended through an administrative enforcement order issued by the state agency that issued the permit. Unocal makes the novel argument that though such an enforcement action cannot "modify" a permit, an extension granted under such an

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[4] In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) of the title [all concerning water quality standards], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. . . .

33 U.S.C. § 1342(*o*)(1). *See New Jersey Public Interest Research Group v. New Jersey Expressway Auth.*, 822 F.Supp. 174, 185 (D.N.J.1992).

order constitutes a valid authorization that has the legal effect of suspending the effect of the permit requirements such that a polluter is shielded from citizen suits seeking to enforce compliance with the permit's original deadline and limits.

It is clear that California law authorizes Regional Boards to issue CDO's that purport to grant polluters an extended time schedule within which to come into compliance with discharge limits. *See* Cal. Water Code § 13301.[5] However, Unocal can point to no case where a federal court has held that a state enforcement action that does not satisfy the requirements to qualify as a valid "modification" of an effluent standard or limit contained in an NPDES permit, can nonetheless suspend the permit limit, shielding the polluter from having the terms of the permit enforced against it through a citizen suit.[6] Indeed,

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[5] When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventative action.

. . . .

Cal.Water Code § 13301.

[6] Again, this argument by Unocal is distinct from its separate argument that, even if the final limits contained in Unocal's NPDES permit did, in theory, take effect on December 12, 1993, and are still in force today, enforcement of those limits

the only analogous case cited by the parties indicates the opposite. That case, *United States v. Bedford*, 1987 U.S.Dist. LEXIS 16103 (N.D.Ohio 1987), *adopted*, 1988 U.S.Dist. LEXIS 18612 (N.D.Ohio 1988), held that a state enforcement action that purported to suspend the terms of an NPDES permit, but which did not qualify as a valid "modification" of the permit, did not prevent the federal government from bringing a civil enforcement action in federal court pursuant to 33 U.S.C. § 1319(b) to enforce the terms of the permit. 1987 U.S.Dist. LEXIS 16103, at *10-*12. 33 U.S.C. § 1319(b) authorizes the U.S. Attorney General to bring suit to enforce compliance with, *inter alia*, effluent limits imposed under NPDES permits. Since the instant citizen suit also seeks enforcement of permit limits,[7] *Bedford* is authority for the proposition that the Regional Board's CDO did not suspend the final limits

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through a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). That separate argument is addressed by the Court later in this opinion. *See infra* Part III.B.2.

[7] 33 U.S.C. § 1319(b), the enforcement provision involved in *Bedford*, authorizes the Attorney General to sue polluters who violate, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. §§ 1319(a), (b). As noted above, violation of effluent limits imposed under an NPDES permit places a permit-holder in violation of 33 U.S.C. § 1311(a). *See* discussion *supra* Part I.A. As also noted above, citizen suits may be brought under 33 U.S.C. § 1365 for violations of, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1). Thus, NPDES permit limits that are enforceable by the federal government under 33 U.S.C. § 1319(b) are also enforceable through citizen suits. The only exception to this proposition obtains where a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A) by a pending or final state or federal enforcement action. This separate bar to citizen suits is discussed later in the opinion. *See infra* Part III.B.2.

and deadline contained in Unocal's NPDES permit such that those terms may not still be enforced against it.

Unocal attempts to draw support for its position from language found in *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428, 1436 (D.Colo.1993). However, *Colorado Refining Co.* concerned only whether a state enforcement action erected a 33 U.S.C. § 1319(g)(6)(A) preclusive bar against a citizen suit, and expressed no opinion on Unocal's instant argument. Unocal's citations to *Northwest Environmental Advocates v. Portland*, 11 F.3d 900, 906-11 (9th Cir.1993), and this Court's recent opinion in the related case of *California Public Interest Research Group v. Shell Oil Co.*, 840 F.Supp. 712 (N.D.Cal.1993), are similarly inapposite. *Portland*, as discussed later in this opinion, involved entirely different issues. Similarly, the language quoted from *Shell* stating that "any challenge to effluent limits in an NPDES permit presents a matter for the Water Board, not this Court, to address," 840 F.Supp. at 712, concerns just what it says: the circumstances under which a discharger may bring suit in federal court to *challenge* limits contained in an NPDES permit promulgated by a state enforcement agency. *Shell* in no way addresses the entirely separate issue of citizen suits to *enforce* permit limits.

In its reply papers, Unocal also cites an administrative ruling issued by the Environmental Appeals Board of EPA, *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, 1990 NPDES LEXIS 4 (April 16, 1990), as supporting their argument that a non-modification can nonetheless excuse non-compliance with an NPDES permit. The language from *Star-Kist* cited by Unocal simply states that EPA has authority, under 33 U.S.C. § 1319(a), to issue

compliance orders that extend the deadlines for polluters to come into compliance with their NPDES permit requirements. That proposition is non-controversial. *Star-Kist* does not address the subtly but significantly different issue of the effect of such extensions: whether EPA compliance orders extending NPDES permit deadlines suspend the effect of the permit requirements such that polluters are shielded against citizen suits seeking to enforce compliance with the permit limits. Nor does *Star-Kist* address the analogous issue that is presented on this motion: whether *state* compliance orders extending NPDES permit deadlines can suspend the effect of permits such that their terms may no longer be enforced through citizen suits.

At first blush, it may not appear obvious how to assemble the different component parts of the statutory scheme at issue here into a coherent whole. First, there exist the very stringent procedures and substantive rules limiting the circumstances under which enforcement agencies may "modify" the terms of NPDES permits. Second, there exists authorization for enforcement agencies to bring civil penalty actions, *see* 33 U.S.C. § 1319(g), pursuant to which compliance schedules may, *de facto*, be extended, since such actions preclude citizen suits to enforce the NPDES permits. *See* 33 U.S.C. § 1319(g)(6)(A)(iii).[8] Third, there exists authorization for

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[8] Although 33 U.S.C. § 1319(g) authorizes only *federal* civil penalty actions brought by EPA, 33 U.S.C. § 1319(g)(6)(A)(iii) provides that penalty actions brought by *state* agencies under comparable state laws trigger the same preclusive bar against citizen suits to enforce NPDES permits.

enforcement agencies to bring non-penalty civil compliance actions, *see* 33 U.S.C. § 1319(a),[9] pursuant to which compliance schedules may be extended, *Star-Kist*, 1990 NPDES LEXIS 4, at *21, but which nonetheless do *not* bar citizen suits to enforce the terms of the original NPDES permits. *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir.1993).

The element of the scheme the role of which may at first appear difficult to reconcile is the non-penalty civil compliance action. On the one hand, it is clear that such actions cannot amend NPDES permits to postpone compliance deadlines, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and do not trigger the statutory preclusive bar against citizen suit enforcement of limits contained in NPDES permits. *Pendleton*, 11 F.3d 883. On the other hand, however, it is also clear that EPA *can* authorize extended compliance schedules in the course of such compliance actions, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and that Regional Water Quality Control Boards can do the same under California law. Cal. Water Code § 13301. If such extended compliance schedules do not suspend the effect of limits and deadlines contained in NPDES permits such that the permit terms may still be enforced against the polluter through citizen suits, then what good are compliance actions and what meaning do their extended timetables have? The answer to this question is that such

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[9] Although 33 U.S.C. § 1319(a) authorizes only *federal* non-penalty civil compliance actions brought by EPA, as noted above, California Water Code § 13301 authorizes regional water boards to bring non-penalty civil compliance actions pursuant to which a revised compliance time-tables may be established. *See supra* note 5.

orders constitute agreements by the issuing enforcement authority on how the authority – be it EPA or a state agency – plans to exercise its prosecutorial discretion. Given that such authorities are vested with enforcement powers broader in some respects than those conferred on private citizens under the citizen suit provision, and that in the vast majority of cases there exists no serious threat of citizen suit enforcement, assurances regarding authorities' intended exercise of their enforcement discretion carry great real-world significance. *See Shell*, 840 F.Supp. at 716-17 (construing language in NPDES permit as an assurance as to how the Regional Board intended to exercise its prosecutorial discretion, and not as a term modifying and weakening the permit's effluent limit). Thus, even if they cannot shield polluters from citizen suits brought to enforce the terms of NPDES permits, such actions still serve a meaningful role in the Clean Water Act enforcement scheme.

With this tension resolved, the Court concludes that, when viewed as a whole, the structure of the Clean Water Act clearly evidences a legislative intent on the part of its drafters that disfavors the interpretation urged by Unocal regarding the effect of deadline extensions contained in administrative compliance orders. As explained above, the statute imposes a variety of stringent conditions before administrative actions can modify the terms of NPDES permits. Moreover, as discussed in the next section, the statute also expressly provides that citizen suits are barred only in circumstances where certain specified types of agency enforcement actions have been taken by state or federal enforcement agencies. Unocal, in effect,

contends that administrative extensions of permit deadlines can bar citizen suits to enforce permits even where the extensions neither (1) qualify as "modifications," nor (2) satisfy the requirements of the provision that expressly bars citizen suits in some circumstances. Recognition of such an unenumerated category of administrative extension would render superfluous the very specific requirements established by Congress for permit modifications and preclusion of citizen suits. The canon of statutory construction strongly disfavors such interpretations that do not accord meaning to every word and provision in a statute, or to statutory distinctions drawn by Congress. *See United States v. Nordic Village, Inc.*, ___ U.S. ___, ___, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992) ("[It is a] settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect."); *In the Matter of Greystone III Joint Venture*, 948 F.2d 134, 138-39 (5th Cir.1991) (interpretation of one statutory provision so as to render another provision superfluous "is anathema to elementary principles of statutory construction"). By writing these provisions out of the statute, Unocal's construction would create an enormous loophole, elevating civil compliance orders to the status of *de facto* modifications, thereby allowing dischargers to achieve, in effect, modifications that would otherwise be illegal under the Act. The existence of these specific provisions in the statute creates a strong inference that Congress did not intend to authorize unenumerated exceptions of the sort urged by Unocal.[10]

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[10] Additional support for this conclusion can be inferred from *Washington Public Interest Research Group v. Pendleton*

In light of the above, the Court holds that, as a matter of law, an administrative enforcement action by a state agency charged with enforcing the Clean Water Act that purports to extend a deadline specified in an NPDES

Woolen Mills, 11 F.3d 883 (9th Cir.1993). In *Pendleton*, the EPA issued an administrative compliance order to a polluter that had violated the discharge limits specified in its NPDES permit. The EPA order set an extended compliance schedule, and ordered the polluter to make certain identified physical improvements deemed to be necessary to bring about compliance, and threatened sanctions if the polluter did not comply with the terms of the compliance order. Subsequently, an environmental group filed a citizen suit seeking, *inter alia*, an injunction requiring immediate compliance with the discharge limits specified in the permit. The Ninth Circuit held that because the type of enforcement action that EPA had taken was not an administrative penalty action under 33 U.S.C. § 1319(g) but rather an administrative compliance action under 33 U.S.C. § 1319(a), a citizen suit could still be maintained to enforce the limits and deadlines contained in the original permit. (As noted above and discussed below, penalty actions can trigger the 33 U.S.C. § 1319(g)(6)(A) preclusive bar against citizen suits.)

The *Pendleton* defendant apparently did not expressly raise the argument made by Unocal that the administrative order extending the compliance deadline suspended the effect of the permit deadline such that it was not enforceable through a citizen suit. However, in reversing, the Ninth Circuit implicitly rejected this argument, for the argument would have afforded an alternative basis for affirming the district court's dismissal, and the court of appeals will normally affirm so long as there exists any alternative ground, fairly supported in the record, that would justify the district court's ruling. *Golden Nugget, Inc. v. American Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir.1987) (affirmance on alternative ground appropriate where the record adequately establishes material facts and issues are purely legal). Thus, the *Pendleton* holding supports an inference that the Ninth Circuit was not persuaded by Unocal's argument.

permit for complying with the permit's discharge limits does not serve to suspend the permit's deadlines such that they may not be enforced through a citizen suit. Such an extension, unless it satisfies the requirements to qualify as a "modification," is simply a statement by the agency as to how it plans to exercise its prosecutorial discretion. Unocal's motion to dismiss plaintiffs' first cause of action on this ground is therefore DENIED.

2. WHETHER A CITIZEN SUIT IS PRECLUDED UNDER THE 33 U.S.C. § 1319(g)(6)(A)(iii) BAR

As noted above, the Clean Water Act expressly provides that citizen suits are barred in circumstances where certain categories of agency enforcement action have either been concluded or are pending with respect to an alleged violation. Unocal contends that the CDO issued by the Regional Board qualifies as an enforcement action that suffices to trigger a preclusive bar against the instant citizen suit, thereby requiring its dismissal.

33 U.S.C. § 1319(g)(6)(A) provides:

> [A]ny violation –
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under [33 U.S.C. § 1319(g), which allows EPA to assess civil penalties],
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an

> action under a State law comparable to [33 U.S.C. § 1319(g)], or
>
> (iii) *for which* the Administrator, the Secretary, or *the State has issued a* ***final*** *order not subject to further judicial review and the violator has paid a* ***penalty*** *assessed under [33 U.S.C. § 1319(g)], or such* ***comparable*** *State law,* as the case may be,
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). Unocal contends that the CDO and the settlement agreement constitute "a final order" under a state law "comparable" to 33 U.S.C. § 1319(g) for which the violator has paid an assessed "penalty," thereby triggering the citizen suit bar under 33 U.S.C. § 1319(g)(6)(A)(iii). In order for dismissal on this ground to be appropriate, all of these conditions must be met.

a. "Final Order"

Plaintiffs argue that the CDO and settlement agreement do not constitute a "final order not subject to further judicial review." Under the settlement agreement, Unocal and the other refineries expressly retained the right to challenge in court in 1998 the final selenium limits specified in their NPDES permits when, under the CDO, they are finally obligated to comply with those

limits.[11] In light of this provision, there indeed appears to be a substantial issue as to whether the CDO is a "final order" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii). However, because this issue was not well briefed by the parties and since there exist other bases for denying dismissal on preclusion grounds, the Court declines to reach this question.

b. "Comparable State Law"

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a penalty assessed under [33 U.S.C. § 1319(g)], or such comparable State law." In evaluating whether this provision is satisfied in this case, the Court must determine, first, what state law the putative penalty was assessed under and, second, whether that law is "comparable" to 33 U.S.C. § 1319(g).

i. The Regional Board's Action Was Taken under California Water Code § 13301

California law vests regional water boards with a variety of different prosecutorial tools for enforcing

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[11] The settlement agreement provides that the refineries agree not to challenge the final selenium limits in court in 1998 if they are able to win an additional extension of the compliance schedule pursuant to ¶ 5 of the CDO. However, that concession is no concession at all, for if the refineries succeed in obtaining such an additional extension of the compliance deadline, then, of course, there will be no reason for them to challenge the limits.

compliance with effluent limits or standards imposed under NPDES permits. These include issuance of cease and desist orders under California Water Code § 13301, issuance of cleanup or abatement orders under California Water Code § 13304, imposition of administrative civil penalties under California Water Code § 13385, and referral to the California Attorney General for civil prosecution.

It appears quite clear that in issuing the CDO, the Regional Board was exercising its authority under California Water Code § 13301, which empowers regional boards to issue cease and desist orders pursuant to which such boards may establish extended time-tables for compliance with Board-imposed effluent limits. Cal.Water Code § 13301(b). The CDO itself expressly states that it was issued "pursuant to Section 13301 of the California Water Code." CDO at 7. Moreover, the CDO offers the following explanation of the decisionmaking process that resulted in the settlement and issuance of the CDO:

> The Regional Board has considered the various enforcement and penalty options available to it regarding violation of [the NPDES permit], including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

CDO at 6.

Unocal appears to argue that since Unocal, Exxon, and Shell agreed to make a $2 million payment to the state as part of the settlement of which the CDO was a component, the Regional Board's enforcement action must be construed as a civil penalty action under California Water Code § 13385. Unocal speculates that if it, Exxon, and Shell had refused to agree to the payment, the Regional Board would then have instituted a civil penalty action under § 13385. However, as noted above, the CDO expressly categorized the actions taken as (1) entry of a cease-and-desist order under § 13301, and (2) settlement of the refineries' state court lawsuit. The fact that the Board identified its actions as such after first noting the different enforcement options available to it – including the option of imposing of a civil penalty under § 13385 – makes clear that the Board expressly declined to invoke its § 13385 authority in issuing the CDO and entering the settlement agreement. The only mention of the $2 million payment in the CDO is found in the "findings" section, where the payments are described only as a "term" of the settlement of the state court lawsuit, CDO at 6; no mention of the payment appears in the "order" section of the CDO, and the document does not purport to order payment of the sum.

This labeling clearly was not accidental. The CDO and settlement agreement resulted from lengthy and detailed negotiations among the parties. The Court sees no reason to disregard the Regional Board and the parties' deliberate decision to label the Board action a cease-and-desist order, and the accompanying document a settlement agreement. If the Board and the parties had intended for the Board order and settlement agreement to

be deemed a settlement of a threatened but unfiled civil penalty action, they could easily have so indicated. The Court must conclude from their failure to do so that they did not so intend. Since the Regional Board is vested with authority to choose which of its enforcement options to exercise, the Board's categorization of its action as a cease-and-desist action under § 13301 is dispositive of the question of what type of enforcement action the Board attempted to take.

In light of the above, the Court concludes that, as a matter of law, the CDO was issued in an exercise of the Board's administrative enforcement authority under California Water Code § 13301 to issue cease and desist orders establishing time-tables for compliance with Board-imposed effluent limits. The Court further concludes that, as a matter of law, the settlement agreement was just that – a settlement of the refineries' state court lawsuit. The Court rules that, as a matter of law, neither instrument constituted an exercise of the Board's authority under California Water Code § 13385 to impose civil penalties.

ii. The "Comparability" Assessment Is Conducted By Examining the Particular State Statutory Enforcement Provision Involved, Not the State Statutory Enforcement Scheme as a Whole

The thrust of Unocal's argument as to why the "comparability" requirement is satisfied in this case focuses not on the particular statutory power that the Board was

exercising in issuing the CDO and entering the settlement, but rather on the California law enforcement scheme as a whole. Unocal argues that even if the CDO was issued pursuant to California Water Code § 13301 and even if, as the Court concludes below, that enforcement provision is not comparable to 33 U.S.C. § 1319(g), the comparability requirement is still satisfied because the comparability assessment must be conducted by examining the state statutory enforcement scheme as a whole, not simply the particular state statutory enforcement provision under which the action in question was taken. Unocal argues that the California scheme, when all of its various enforcement provisions are considered, is comparable to 33 U.S.C. § 1319(g), thereby satisfying the requirement.

The issue here is whether the language "comparable state law" should be interpreted to mean "comparable state enforcement scheme" or "comparable state enforcement provision." While quite technical, this interpretive question is an important one which has not yet been resolved by the courts. Research has revealed only a single reported decision discussing this question at any length. That case, *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir.1991), did not construe the comparability requirement as it applies under 33 U.S.C. § 1319(g)(6)(A)(iii); rather it interpreted it under a neighboring provision, 33 U.S.C. § 1319(g)(6)(A)(ii), which reads:

[A]ny violation –

* * *

> (ii) *with respect to which a State has commenced and is diligently prosecuting an action under a State law* ***comparable*** *to [33 U.S.C. § 1319(g)]*
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). However, because the language in the two provisions is parallel and the canon of statutory construction presumes that when Congress uses a term in more than one location in a statute, it is meant to have the same meaning, *see United States v. Thompson/Center Arms Co.*, ___ U.S. ___, ___ n. 5, 112 S.Ct. 2102, 2107 n. 5, 119 L.Ed.2d 308 (1992) (plurality opinion); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1363 (5th Cir.1993), *Scituate* is relevant to the instant question before this Court.

In *Scituate*, the state was prosecuting an enforcement action under a provision of state law that would not result in imposition of civil penalties against the Clean Water Act violator. Arguing that the comparability assessment required the court to compare the particular state enforcement provision used by the state with 33 U.S.C. § 1319(g), the citizen suit plaintiff contended that the preclusive bar was not triggered since the state was proceeding under a provision that, unlike 33 U.S.C. § 1319(g), did not authorize imposition of civil penalties. However, the *Scituate* court concluded that, for policy reasons, the comparability requirement should be applied

to the state enforcement scheme as a whole, not the particular enforcement provision at issue. The court reasoned that provision-by-provision analysis would mean that some state enforcement actions would not trigger the bar against citizen suits, and would thereby allow duplicative enforcement proceedings. The *Scituate* court concluded that Congress meant for citizen suits to be available only where the state is not addressing the problem at all, and not simply wherever a state decides not to seek civil penalties. *Scituate*, 949 F.2d at 555-56.

This Court is not persuaded by the reasoning of the *Scituate* court. For several reasons, the Court concludes that the comparability assessment must be made by looking to the particular state enforcement provision at issue, not the state scheme as a whole. First, the structure of § 1319(g) supports an inference favoring this conclusion. The Clean Water Act empowers EPA to respond to violations using any of a variety of enforcement options. However, the statute specifies that only where one specific type of EPA enforcement action – a penalty action under 33 U.S.C. § 1319(g) – has been taken are citizen suits precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). *Pendleton*, 11 F.3d at 885-86. Since whether an EPA enforcement action triggers the preclusive bar depends on the particular enforcement provision under which EPA proceeded, it would logically follow that the same would hold for state laws: that only where a state has proceeded (and assessed a penalty) under a state enforcement provision comparable to 33 U.S.C. § 1319(g) is the preclusive bar triggered. It would be odd indeed to construe the statute as requiring courts to conduct a comparison between the federal 33 U.S.C. § 1319(g) enforcement provision on the one

hand, and the whole of the state enforcement scheme on the other. Clearly, it is more natural to read 33 U.S.C. § 1319(g)(6)(A)(iii) as requiring a comparison between the specific state enforcement provision actually used and the specified federal enforcement provision, 33 U.S.C. § 1319(g).

The interpretation urged by Unocal would introduce an anomalous dichotomy into the statute, for state enforcement actions would then enjoy much broader preclusive effects against citizen suits than EPA actions. Any type of state enforcement action would trigger the preclusive bar so long as *somewhere* in the state's enforcement scheme there existed provisions comparable to 33 U.S.C. § 1319(g). Penalties imposed under enforcement provisions not affording procedural safeguards comparable to 33 U.S.C. § 1319(g) would bar citizen suits. Thus, nominal "penalties" imposed under state provisions lacking penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3), and without a right to public notice or opportunity for participation comparable to those provided under 33 U.S.C. § 1319(g)(4), would insulate polluters from citizen actions so long as the state had at its disposal – although had declined to use – other enforcement provisions that are comparable to 33 U.S.C. § 1319(g).

Although the federal enforcement scheme, of course, contains all of these features, federal enforcement actions trigger the preclusive bar only where they are taken under one particular enforcement provision: 33 U.S.C. § 1319(g). Surely the preclusive effect of state enforcement actions can be no broader.

Construing the statute to require enforcement provision comparability would not, as the *Scituate* court contended, be inconsistent with sensible policy or with the goals of the Clean Water Act. The Court can easily imagine that Congress, realizing that state enforcement agencies can be susceptible to regulatory "capture" by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements. Congress might therefore sensibly have decided that the safeguard enforcement device of the citizen suit should be precluded only where a state has taken an enforcement action that approximates the rigor of a federal 33 U.S.C. § 1319(g) enforcement action.

The Court's conclusion as to application of the comparability requirement is also in accord with EPA's own administrative interpretation of the statute. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993). This interpretation of a provision of the Clean Water Act by the federal agency charged with its enforcement constitutes persuasive authority and further buttresses the Court's conclusion today.[12]

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[12] Where a legislative intent regarding a particular statutory issue is not evident from a statute's text or legislative history, courts will defer to the interpretation of the law favored by the agency charged with its enforcement, so long as the agency interpretation is not otherwise inconsistent with the plain language of the statute or with other of its provisions. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, this doctrine does not apply in this case, for the Court

iii. California Water Code § 13301 Is Not "Comparable" to 33 U.S.C. § 1319(g)

Having concluded that the Court must compare California Water Code to § 13301, the state enforcement provision under which the CDO was issued, with 33 U.S.C. § 1319(g) in order to determine whether the 33 U.S.C. § 1319(g)(6)(A)(iii) bar is triggered, the Court has little difficulty deciding that the two provisions are not "comparable."

In conducting such a comparability assessment, other courts have drawn guidance from remarks made on the floor of the Senate by Senator John Chaffee, the principal author and sponsor of the 1987 Clean Water Act Amendments. *See Atlantic States Legal Foundation v. Universal Tool and Stamping Co.*, 735 F.Supp. 1404, 1415 (N.D.Ind.1990) (quoting remarks by Sen. Chaffee). In those remarks, Senator Chaffee stated:

> [T]he limitation of [33 U.S.C. § 1319(g)] applies only where a State is proceeding under a State law that is comparable to [33 U.S.C. § 1319(g)]. For example, in order to be comparable, a State

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infers from the statute's text and structure a legislative intent regarding the question at issue. Nonetheless, the agency's interpretation constitutes persuasive authority supporting the Court's conclusion.

EPA has argued in other cases that in order for a state law to be comparable to 33 U.S.C. § 1319(g), it must have been certified as such by EPA pursuant to 33 U.S.C. § 1342(b). *See Scituate*, 949 F.2d at 556 n. 8. However, as this argument has not been raised by the parties on this motion, the Court shall not address it at this time.

> law *must* provide for a right to a hearing and for public notice and participation procedures similar to those set forth in [33 U.S.C. § 1319(g)]; it *must* include analogous penalty assessment factors and judicial review standards and it *must* include provisions that are analogous to the other elements of [33 U.S.C. § 1319(g)].

133 Cong.Rec. S737 (daily ed., Jan. 14, 1987) (emphasis added), *quoted in Universal Tool*, 735 F.Supp. at 1415. EPA has also issued its own administrative interpretation of the comparability requirements. According to EPA, a state enforcement provision, in order to be comparable, must include the features listed by Senator Chaffee: a right to a hearing analogous to that provided under 33 U.S.C. § 1319(g)(2); public notice and participation requirements analogous to those of 33 U.S.C. § 1319(g)(4); a right to judicial review analogous to that provided under 33 U.S.C. § 1319(g)(8); and penalty assessment factors analogous to those enumerated in 33 U.S.C. § 1319(g)(3). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 4-6. EPA interprets the analogous penalty assessment factor requirement as meaning not only that the maximum potential penalty liability must be at least equivalent to the federal limits, and that the factors to be considered in arriving at the appropriate penalty must be adequate and appropriate, but also that the *actual penalty* collected or assessed must be adequate and appropriate. *Id.* at 5. Support for this interpretation is found in a congressional Conference Report interpreting the comparability requirement under a 1986 version of the Clean Water Act Amendments which contained a provision identical to 33 U.S.C. § 1319(g)(6)(A). (The 1986 bill was

not enacted into law, but the following year the 1987 Clean Water Act Amendments were passed, containing the identical provision now codified at 33 U.S.C. § 1319(g)(6)(A).) *See* House-Senate Conference Report on Clean Water Act Amendments, H.Rep. 99-1004, 99th Cong., 2d Sess., *reprinted in* 132 Cong.Rec. 31577, 31616 (1986).[13] EPA also advises that the state law must provide penalty collection authority and streamlined judicial collection procedures analogous to those of 33 U.S.C. § 1319(g)(9). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 6.

In light of the above legislative history and administrative interpretation by the agency charged with enforcing the statute at issue, the Court holds that the features enumerated in Senator Chaffee's remarks, in the EPA policy guidance, and in the Conference Report, are among those that a state enforcement provision must offer in order to be comparable to 33 U.S.C. § 1319(g). *See Universal Tool*, 735 F.Supp. at 1415.

Examining California Water Code § 13301, the Court notes, even before getting to the above factors, that the

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[13] When a State has proceeded with an enforcement action relating to a violation with respect to which the Administrator [of EPA] or the Secretary [of the Army] is authorized to assess a penalty under this provision the Administrator and the Secretary are not authorized to take any action under [33 U.S.C. § 1319(g)] if the State demonstrates that the state-imposed penalty is appropriate.

House-Senate Conference Report on Clean Water Act Amendments, H.Rep. 99-1004, 99th Cong., 2d Sess., *reprinted* in 132 Cong.Rec. 31577, 31616 (1986).

California law provision does not authorize imposition of civil penalties. The availability of such a remedy is, of course, a necessary prerequisite for "comparability," as is evident from the fact that 33 U.S.C. § 1319(g)(6)(A)(iii) requires not just that civil penalties be available, but that they actually be imposed before the preclusive bar can be triggered. Second, since the California law provision does not authorize penalties, it of course lacks penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3). The presence of such factors is a requirement for comparability. *Universal Tool*, 735 F.Supp. at 1415.

In light of the Court's rulings on the above factors, it is unnecessary for the Court to proceed further and determine whether the California provision satisfies the other comparability requirements. The Court rules that, as a matter of law, California Water Code § 13301 is not "comparable" to 33 U.S.C. § 1319(g) within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).[14]

c. "Penalty"

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a *penalty* assessed under [33 U.S.C. § 1319(g)], or such comparable

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[14] This conclusion is reinforced by *Pendleton*, 11 F.3d 883, for it appears that a cease-and-desist action under California Water Code § 13301 is the equivalent of a federal administrative compliance action under 33 U.S.C. § 1319(a). Since the Ninth Circuit ruled in *Pendleton* that 33 U.S.C. § 1319(a) EPA compliance actions do not trigger the 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar, the Court's ruling today that actions taken under a state law counterpart to 33 U.S.C. § 1319(a) are not barred either gives the statutory scheme a logical parallelism.

State law" (emphasis added). As noted above, Unocal contends that the $2 million payment that it, Exxon, and Shell agreed to make constitutes a "penalty" within the meaning of the statute.

As used in the Clean Water Act, the word "penalty" is a term of art referring to a payment that a polluter is assessed to pay by an enforcement agency. By its nature, a payment can be a penalty only where the statutory grant of authority exercised by the agency is one that empowers the agency to assess penalties. As explained above, the Court has concluded that in issuing the CDO, the Regional Board *was* exercising its authority under California Water Code § 13301 to issue cease and desist orders, and expressly *was not* exercising its authority under California Water Code § 13385 to impose civil penalties. The Court has also concluded that in entering the settlement agreement, the Board was simply settling the refineries' state court lawsuit and was not purporting to exercise its enforcement authority under either of the above provisions. As California Water Code § 13301 does not empower the Board to assess civil penalties in enforcement actions taken pursuant to it, the Court concludes that the $2 million payment agreed to by Unocal, Exxon, and Shell pursuant to the settlement agreement was not, as a matter of law, a penalty within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

This conclusion is reinforced by the fact that the Board specifically avoided characterizing the payment as a penalty. First, both the CDO and the settlement agreement refer to the payment using only the verb "pay"; both studiously avoid any mention of a "penalty." CDO

at 6; Settlement Agreement ¶ 3. Second, at a public hearing on the settlement agreement, the Board's Counsel carefully and deliberately avoided characterizing the settlement monies as a penalty:

> I could perhaps comment further on that question of penalty that Mr. Lozeau [representative of plaintiff San Francisco BayKeeper] raised. I think its true that there is no administrative civil liability action or [section] 13385 of the Water Code action in this case, which is the usual method that the Board takes to assess penalties.
>
> And I think if you look at the expressed language of the settlement, it says, "As part of the settlement, the companies shall collectively pay the Regional Board the sum of two million." The settlement document does not characterize this as a penalty. It characterizes it as a payment. And, therefore, I don't see a need to make any interpretation as to whether this is a penalty or not.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 37. Indeed, at the same hearing Ms. Margaret Rosegay, counsel for Unocal and for the refineries in the state court action, went even further, stating:

> It has always been the refineries' position that they have done nothing wrong and as a consequence *it is inappropriate to characterize the payments which are being made to the Board as a penalty.* Nevertheless, the fact remains that it is money which is being paid. . . . [I]t is being paid as a means of settling the lawsuit. And I think, for all practical purposes, it is, in fact, a penalty.

Id. at 38 (emphasis added). Although conceding that the payment might, practically speaking, function as a penalty, Ms. Rosegay continued to maintain that, legally speaking, it was not one.[15]

It appears quite clear that Unocal, Exxon, and Shell insisted as a condition of the settlement that the payment not be characterized as a "penalty" in order that the settlement not be construed as an admission of wrongdoing. This choice presumably explains as well why the Board and the refineries went out of their way to describe the enforcement action as a California Water Code § 13301 cease and desist action, rather than a California Water Code § 13385 civil penalty action. Indeed, later during the same public hearing a member of the Board admitted as much in the face of questioning by a representative of plaintiff Citizens for a Better Environment-California ("CBE"):

> *[T]he fact that it's not called penalties was part of negotiations.* It is penalties, that's plain and simple what it is.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 28 (emphasis added). Although this statement amounts to a frank admission that the payment functions like a penalty, the Board Member

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[15] Strictly speaking, only the intent of the Regional Board is relevant, since only the Board is empowered to impose penalties. However, the intent and understanding of the refineries is also probative of the Board's intent, since issuance of the CDO and entry the settlement were pursuant to an agreement among those parties.

speaking expressly kept to the position that there was an agreement not to classify the payment as one.[16]

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[16] Unocal cites comments made at the same public hearing by a representative of plaintiff CBE in which the speaker took issue, not with the Board's refusal to term the payment a "penalty," but rather with the amount of the payment, contending that it was too small. *See* Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 25-28 (comments of Mr. Greg Karras). However, any such comments made by a private citizen who was not a party to the settlement is of no relevance for determining whether the Board, or the other parties to the settlement, intended for the payment to be deemed a "penalty."

Unocal also cites the fact that in a letter commenting on the proposed settlement and CDO, EPA's regional office referred to the $2 million payment as a "penalty." *See* Letter to M. Anne Jennings, from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, Dec. 13, 1993, at 2. After oral argument, plaintiffs submitted to the court a letter from EPA's regional office in which EPA expressly disavowed that the use of the term "penalty" in the December 13 letter was intended to imply an opinion on the part of EPA on the above legal question. *See* Letter to Steven Ritchie, et al., from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, date-stamped June 9, 1994. EPA stated that if it had considered the legal question, it would have had to adhere to EPA's position on the application and interpretation of 33 U.S.C. § 1319(g)(6)(A)(iii) set forth in the agency's administrative guidelines. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993) *cited supra*. However, Unocal argues that the Court may not rely on the clarification contained in the June 9 letter, contending that, for several reasons, judicial notice may not properly be taken of the letter on this motion to dismiss.

The Court finds it unnecessary to address whether it may properly take judicial notice of the June 9 letter on this motion,

After having demanded as a condition of the settlement that the Board's enforcement action *not* be an action for civil penalties under California Water Code § 13385 and that the $2 million payment *not* be deemed a "penalty," Unocal now seeks to reverse its position on both of these issues. Unocal cannot have it both ways.

In light of the above, the Court concludes that the $2 million payment agreed to pursuant to the CDO and the settlement agreement does not, as a matter of law, constitute a "penalty" for purposes of 33 U.S.C. § 1319(g)(6)(iii).

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for the Court concludes that, even disregarding the June 9 letter, the December 13 letter does not lend support to Unocal's contention that the payment was regarded by the parties as a "penalty," in the legal sense of the word. First, the casual use of the term "penalty" in EPA's December 13 letter does not appear intended to constitute expression of an opinion by EPA on the technical legal question of whether the payment qualified, as a matter of law, as a "penalty" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii). Second, even if EPA had expressed such an opinion in the letter, that opinion would not be probative of whether the Regional Board and the refineries – the parties that struck the agreement pursuant to which the CDO was issued and the settlement agreement entered – intended for the $2 million payment to be categorized as, for legal purposes, a "penalty." As noted above, it is the intent of the Board and, secondarily, of the refineries, that is relevant in determining whether the payment was meant to be deemed a penalty. *See supra* note 15. As EPA was not a party to settlement and played no role in the Board's enforcement action, its opinion would shed little light on what the Regional Board's intent was regarding the payment.

d. Conclusion Regarding 33 U.S.C. § 1319(g)(6)(A)(iii) Preclusive Bar

The Court has concluded that the settlement agreement entered into by the Regional Board and the refineries and the CDO issued by the Regional Board were not actions taken under a state law "comparable" to 33 U.S.C. § 1319(g), and that the $2 million payment agreed to by Unocal, Exxon, and Shell was not a "penalty" assessed under such a law. As satisfaction of both of these criteria is a prerequisite for application of the preclusive bar against citizen suits under 33 U.S.C. § 1319(g)(6)(A)(iii), the Court rules that the § 1319(g)(6)(A)(iii) bar does not apply to preclude litigation of the instant citizen suit against Unocal.[17] Unocal's

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[17] In a single sentence in a footnote in its reply memorandum, Unocal asserts that plaintiffs' citizen suit is also barred under 33 U.S.C. § 1319(g)(6)(A)(ii). In order for that provision to apply, the state must currently be "diligently prosecuting an action under a State law comparable to [33 U.S.C. § 1319(g)]" with respect to the same violation alleged in the citizen suit. The Court has already ruled above that the Regional Board's enforcement action against Unocal was taken under a state enforcement provision that is not comparable to 33 U.S.C. § 1319(g). Additionally, the Court rules that with the entry of the settlement agreement and the CDO, the Regional Board's enforcement action is no longer still being "prosecuted" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii). Although those instruments impose various obligations on Unocal over the upcoming years, the prosecution of the action is for the present time completed and will only be renewed by the Board if Unocal fails to carry out its responsibilities under the settlement and CDO. As both the "being prosecuted" and "comparability" requirements of 33 U.S.C. § 1319(g)(6)(A)(ii) are thus not satisfied, the instant citizen suit is not barred under that provision.

motion to dismiss the suit on this ground is therefore DENIED.

3. WHETHER NOTICE WAS TIMELY AND ADEQUATE

The citizen suit provision of the Clean Water Act specifies that no action may be commenced "prior to sixty days after the plaintiff has given notice of the alleged violation. . . . " 33 U.S.C. § 1365(b)(1)(A). In the suit against Unocal, plaintiff CBE gave notice of their intent to sue on November 9, 1993. Plaintiffs Save San Francisco Bay, San Francisco BayKeeper, The Bay Institute, Kalon Wofford, and Anthony Willis gave notice on January 18, 1994. Plaintiff Santa Clara Valley Audubon Society gave notice on March 1, 1994. The suit was filed on March 2, 1994.

In view of the above dates, only the notice given by plaintiff CBE was received more than sixty days prior to the filing of the suit on March 2, 1994. Thus, the suit satisfies the sixty-days notice requirement of 33 U.S.C. § 1365(b)(1)(A) only if CBE's notice was adequate.

a. Validity and Effectiveness of Pre-Violation Notice

Unocal argues that CBE's notice was not valid and effective because it was given prior to December 12, 1993 – the deadline by which Unocal was required to come into compliance with the final selenium limits specified in its NPDES permit. Although it was indisputable that Unocal would not be in compliance with the permit limits

by the December 12, 1993 deadline, Unocal nonetheless argues that in order for notice of intent-to-sue to be valid and effective in a Clean Water Act citizen suit, the notice must be given *after* – rather than in anticipation of – the alleged violation. In support of this proposition, Unocal cites to language in the citizen suit provision that makes reference to "violations." *See* 33 U.S.C. § 1365(a)(1) ("[citizen suits may be brought] against any person . . . who is alleged to be *in violation* of . . . an effluent standard or limitation") (emphasis added); 33 U.S.C. § 1365(b)(1)(A) ("No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the *alleged violation*. . . . ") (emphasis added). Unocal interprets this language as meaning that neither may a suit be initiated, nor valid notice of intent-to-sue given, until a violation has actually occurred.

The parties have cited no authority addressing precisely this issue. A somewhat related issue was addressed in *Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, 608 F.Supp. 440 (D.Md.1985). Although in that case the plaintiff's notice of its intent to sue was given after the date of the alleged violation, the plaintiff's suit also challenged an alleged continuing violation which, by definition, involved violations that had not yet occurred as of the date of notice. The court rejected the defendant's motion seeking dismissal of the continuing violation claims, ruling that the pre-violation notice of the claims satisfied the statutory notice requirement. *Id.* at 450-51.

Unocal has offered no compelling policy reasons why it would not make sense to construe 33 U.S.C. § 1365(b)(1)(A) as permitting pre-violation notice. Although the Supreme Court has stressed that the sixty-

day notice requirement in citizen suit provisions of environmental statutes must be strictly enforced, *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), the Court has explained that the purpose for this requirement is to ensure that the defendant and/or government enforcement authorities are given some pre-suit notice so that they have an opportunity to address the matter *before* a lawsuit is filed. *Id.* at 30-31, 110 S.Ct. at 311. This purpose is fully served by permitting pre-violation notice. Indeed, such notice may actually *further* this goal, for it affords defendants and enforcement authorities an opportunity to attempt to avert or mitigate anticipated violations. In light of these considerations, and in the absence of any assistance from case law addressing the issue, the Court holds that notice of a citizen plaintiff's intent-to-sue filed in anticipation of – and thus prior to – a violation of the Clean Water Act counts as valid and effective notice for purposes of 33 U.S.C. § 1365(b)(1)(A).

b. Inclusion of Plaintiffs Who Did Not Give Timely and Adequate Notice

Unocal argues as well that, regardless whether CBE's pre-violation notice was valid and effective, the other plaintiffs must be dismissed from the case for it is undisputed that their notice was not served more than sixty days prior to the filing of the suits. Plaintiffs counter that so long as at least one plaintiff has given defendant proper notice in accord with 33 U.S.C. § 1365(b)(1)(A), other plaintiffs who have not individually given the statutory sixty days notice may nonetheless permissibly join in the lawsuit. This Court recently addressed precisely

this issue in the related case of *California Public Interest Research Group v. Shell Oil Co.*, Nos. C 92-4023 TEH, C 93-0622 TEH (N.D.Cal. Jan. 5, 1994). In *Shell* the Court wrote:

> [A] number of courts have ruled that so long as defendants receive proper notice of the action from one plaintiff, additional plaintiffs can join without filing separate 60 day notices. These cases reason that where defendants have notice of the impending suit and an opportunity to resolve the matter short of litigation, there is no reason to exclude additional plaintiffs who later join the action. *See Klickitat County v. Columbia River Gorge Comm'n*, 770 F.Supp. 1419, 1424 (E.D.Wash.1991) ("The fact that other plaintiffs have joined in the litigation doesn't change the fact that the Forest Service was aware of the impending lawsuit and the basis for the claim."); *Student Public Interest Research Group ("PIRG") of New Jersey, Inc. v. Tenneco Polymers, Inc.*, 602 F.Supp. 1394, 1396 (D.N.J.1985) (citing lack of prejudice to defendants since they were put on notice as to the nature of the suit); *Student PIRG of New Jersey, Inc. v. AT & T Bell Laboratories*, 617 F.Supp. 1190, 1194 (D.N.J.1985) ("because one plaintiff served adequate notice . . . defendant's right to adequate notice was preserved"); *South Carolina Wildlife Federation v. Alexander*, 457 F.Supp. 118, 123-24 (D.S.C.1978).
>
> [Defendant] contends that the Supreme Court implicitly overruled these cases in *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). As discussed above, *Hallstrom* holds that the 60 day pre-suit notice requirement is not something that the courts can

> waive, but rather is a mandatory requirement. We should construe this holding, [defendant] argues, to require that *each individual plaintiff* named in the action must provide 60 days pre-suit notice. *Hallstrom*, however, never addresses this issue, since in that case, the defendants received *no* pre-suit notice at all. Moreover, *Hallstrom* focused on the statutory mandate that defendants be given some pre-suit notice so that they would have an opportunity to address the matter *before* a lawsuit was filed. The reasoning of the cases cited above is completely consistent with, and does not undercut, this rationale. We also note that at least one district court has continued to allow additional persons to join as plaintiffs after *Hallstrom*. *See Klickitat*, 770 F.Supp. at 1424.

Id., Slip Op. at 6-7. By its terms, 33 U.S.C. § 1365(b)(1)(A) requires only that sixty days notice be given before a "[citizen] *action*" is commenced. The statute does not provide that every *plaintiff* must give such notice. Following its ruling in *Shell*, the Court holds that the 33 U.S.C. § 1365(b)(1)(A) requirement attaches to the lawsuit – *not* the plaintiff – and that the requirement is satisfied so long as at least one plaintiff has given statutorily adequate notice. As the Court has ruled above that pre-violation notice is statutorily adequate, the Court holds that the 33 U.S.C. § 1365(b)(1)(A) notice requirement is satisfied in this case. Unocal's motion to dismiss some or all of the plaintiffs for failure to satisfy the notice requirement is therefore DENIED.

For the reasons set forth above, the Court rejects each of the arguments raised by Unocal as to why plaintiffs' first cause of action should be dismissed. In light of these

rulings, Unocal's motion to dismiss that claim is DENIED.

C. SECOND CAUSE OF ACTION: VIOLATION OF WATER QUALITY STANDARD

Regarding the second cause of action, Unocal points out that the Ninth Circuit has recently ruled that water quality standards contained in NPDES permits – as distinct from effluent standards or limitations – are not enforceable in citizen suits under the Clean Water Act. *Northwest Environmental Advocates v. Portland*, 11 F.3d 900, 906-11 (9th Cir.1993). In their opposition papers, plaintiffs concede that their claim for violation of water quality standards fails to state a claim and should be dismissed. Accordingly, Unocal's motion to dismiss this claim is GRANTED.

D. THIRD CAUSE OF ACTION: STATE UNFAIR BUSINESS PRACTICES CLAIM

Plaintiffs' third cause of action alleges that Unocal has, by not meeting the December 12, 1993 deadline set forth in its NPDES permit, engaged in an unfair business practice in violation of California Business & Professions Code § 17200 *et seq.* Unocal moves to dismiss this claim on two separate but related grounds. First, contending that plaintiffs' two federal law causes of action must both be dismissed, it argues that there consequently exists no pendent jurisdiction over the state law claim. Second, because an element of the state law claim, as pleaded by plaintiffs, is that defendant has violated the federal Clean

Water Act, Unocal – contending that plaintiffs' federal Clean Water Act claims fail to state a claim – argues that the state law claim therefore fails as well for the same reasons. As the Court has ruled that plaintiffs' first federal cause of action does, in fact, state a claim, both of these arguments for dismissal must be rejected. Unocal's motion to dismiss this cause of action is therefore DENIED.

IV. CONCLUSION

For the foregoing reasons, the Court HEREBY ORDERS:

1. *Citizens for a Better Environment-California v. Exxon*, No. C 94-0713 TEH, is TRANSFERRED FORTHWITH from this Court to the U.S. District Court for the Eastern District of California;

2. Unocal's motion to dismiss plaintiffs' first cause of action is DENIED;

3. Unocal's motion to dismiss plaintiffs' second cause of action is GRANTED;

4. Unocal's motion to dismiss plaintiffs' third cause of action is DENIED;

5. Unocal's motion to dismiss plaintiffs Citizens for a Better Environment-California, Save San Francisco Bay, San Francisco BayKeeper, The Bay Institute, Santa Clara Valley Audubon Society, Kalon Wofford, and/or Anthony Willis is DENIED.

IT IS SO ORDERED.

APPENDIX 3

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER 91-026

AMENDING NPDES PERMITS FOR THE DISCHARGERS CITED HEREIN

The California Regional Water Quality Control Board, San Francisco Bay Region, (hereinafter called the Board), finds that:

1. The Dischargers listed below have been previously issued permits by this Board under the National Pollutant Discharge Elimination System (NPDES) in the Orders indicated below:

Discharger	NPDES Number	Order Number	Date Issued
Chevron USA, Richmond Refinery	CA0005134	87-073	6/17/87
Tosco Corp., Avon Refinery	CA0004961	88-053	4/20/88
Exxon Comp. USA, Benicia Refinery	CA0005550	90-096	6/20/90
Shell Oil Comp., Martinez Manuf. Complex	CA0005789	90-095	6/20/90
Union Oil Comp., San Francisco Refinery	CA0005053	89-002	1/18/89
Pacific Refining Company	CA0005096	90-104	7/18/90

2. The Board adopted a revised Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) on December 17, 1986, and the State Water Resources Control Board approved it on May 21, 1987.

3. The wastewater from the above dischargers goes into the following receiving waters:

Discharger	Receiving Water
Chevron	San Pablo Bay
Tosco	Suisun Bay
Exxon	Suisun Bay
Shell	Carquinez Strait
Union	San Pablo Bay
Pacific	San Pablo Bay

4. The beneficial uses of the above receiving waters are:

Beneficial Use	San Pablo Bay	Suisun Bay	Carquinez Strait
Industrial Service Supply	X	X	X
Navigation	X	X	X
Water Contact Recreation	X	X	X
Non-contact Water Recreation	X	X	X
Commercial and Sport Fishing	X	X	X
Wildlife Habitat	X	X	X
Preservation of Rare & Endangered Species	X	X	X
Fish Migration and Spawning	X	X	X
Shellfish Harvesting	X		
Estuarine Habitat	X	X	X

5. The dischargers named above have been identified as substantial point sources of selenium, a component of crude oil which is a part of their wastewater streams. Selenium has been found to bioaccumulate in San Francisco Bay organisms, and threatens beneficial uses of water such as estuarine habitat and preservation of rare and endangered species.

6. On September 28, 1990, the EPA announced its final decision on the lists required by Section 304L of the federal Clean Water Act. Section 304L required an identification of point sources whose discharges contribute to violations of narrative or numerical water quality standards. The above dischargers are listed because of health warnings on consumption of ducks issued by the State Department of Health Services. This warning was due to elevated tissue levels of selenium.

7. The above dischargers have reported the following recent selenium discharge levels;

(Mean Load, lb/day)

Refinery	1989	1990
Shell	3.3	5.0
Union	4.0	5.1
Chevron	1.5	1.6
Exxon	1.3	1.6
Tosco	0.7	0.5
Pacific	0.04	0.03
Total:	10.8	13.8

(Mean Concentration, ug/l)

Refinery	1989	1990
Shell	90.	110.
Union	270.	300.
Chevron	31.	27.
Exxon	53.	85.
Tosco	18.	11.
Pacific	24.	20.

8. Section 304L also required the Regional Board to develop individual control strategies (ICS) for the dischargers listed pursuant to it. An ICS must assure that through effluent limitations that applicable water quality standards are attained and beneficial uses are protected as soon as possible, but not later than 3 years from the date of adoption of the ICS. In this case, the ICS consists of an NPDES permit amendment to the above permits, requiring compliance with a selenium effluent limit within 3 years. The proposed effluent limits are derived from the EPA freshwater criteria of 5 ppb. The dischargers will be given the opportunity to propose alternate effluent limits based on site-specific objectives, but in order for such an alternate to be approved by this Board and the EPA, the proposed limits must be protective of all applicable beneficial uses, such as estuarine habitat and preservation of rare and endangered species, and must take into account the full bioaccumulation potential of the selenium that is discharged.

9. The above dischargers have previously been required to conduct source control and treatment assessment programs designed to reduce their selenium discharges to the range of 1, 10 and 50 parts per billion (ppb), but they do not yet have selenium effluent limits as required by Section 304L.

Chevron is an exception, as their permit already contains a performance based limit.

10. Order 87-073, issued to Chevron USA on June 17, 1987, prescribed selenium concentration effluent limits for the wastewater discharge from the Richmond refinery. This Order was subsequently amended by Order 88-125, issued on July 20, 1988. Order 88-125 deleted the selenium concentration limits contained in Order 87-073, and instead required performance-based mass loading limits. A monthly average of 3.5 pounds per day, and a daily maximum of 3.7 pounds per day, was set. Since that time, Chevron undertook a study investigating selenium sources, and possible methods of removal of selenium from their effluent. After reviewing a number of options, they decided to recycle a portion of their effluent, reducing their mass discharge by at least 10%.

11. The Board and the U.S. Environmental Protection Agency believe that an increase in the emissions of selenium would be contrary to the requirements under Section 304(L) of the Clean Water Act. In addition, Federal and State antibacksliding and antidegradation regulations under the Clean Water Act apply, as beneficial uses in San Francisco Bay have been impaired due to selenium discharges. The Board therefore proposes to limit Tosco, Pacific Refining, and Chevron USA to their current selenium discharge by issuance of performance-based mass limits.

12. The issuance of waste discharge requirements for these dischargers is exempt from the provisions of Chapter 3 (commencing with Section 21110) of Division 13 of the Public Resources Code (CEQA) pursuant to Section 13389 of the California Water Code.

13. The Board has notified the dischargers and interested agencies and persons of its intent to amend waste discharge requirements for the discharges and has provided them with an opportunity for a public hearing and an opportunity to submit their written views and recommendations.

14. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

IT IS HEREBY ORDERED that:

A. The NPDES permits as contained in the Orders cited in Finding 1 of this Order are amended as follows:

1. The Dischargers named below shall comply with a selenium effluent limit of 50 parts per billion and the mass emission rate listed below, by December 12, 1993:

Discharger:	Concentration Limit: (daily maximum)	Mass emission rate: (running annual average)
Shell	50 ppb	2.13 lbs/day *
Union	50	0.85 *
Exxon	50	0.96 *
Tosco	50	* *
Pacific	50	* *
Chevron	50 ppb	* *

* Based on 50 ppb at 1990 average flow:
(Shell: 5.1 MGD, Exxon: 2.3 MGD, Union: 2.03 MGD)

** To be determined by the Board as soon as possible.

2. The Dischargers named above have the option to seek alternate effluent limits acceptable to both the Board and the EPA, in lieu of those listed above, pursuant to the tasks listed below:

a. Selenium removal and source control

Tasks	Deadline
Submit a statement noting intent to pursue an alternate limit. Also submit a study plan acceptable to the Executive Officer to evaluate the cost and effectiveness of removing selenium to achieve the above effluent limit. This plan is to consider all reasonable treatment and source control measures, including but not limited to crude source management, waste recycling, and operational modifications	April 12, 1991
Submit final report on cost/effectiveness of selenium control. Selenium studies previously or concurrently being conducted can be substituted with the concurrence of the Board's Executive Officer	December 12, 1991

b. Development of Water Quality-Based Objectives/limits

Tasks	Deadline
Submit a study plan acceptable to the Executive Officer for at least monthly monitoring of selenium concentrations in water, bivalve tissues and sediments along a distance gradient from the discharge outfall. This monitoring shall note the relative percentages of inorganic and organic selenium species. The study shall include bioassays and bioaccumulation analyses at locations and frequencies to be determined.	April 12, 1991
Submit a study plan for development of site-specific receiving water criteria for selenium. The study is to consider site-specific receiving water chemistry, selenium speciation, and resident species sensitivity, as well as the final results of the above beneficial use impact study.	June 12, 1991

Complete and submit final report on studies for development of site-specific receiving water criteria for selenium which are protective of applicable beneficial uses such as estuarine habitat and preservation of rare and endangered species. These criteria must also take into account the full bioaccumulation potential of the selenium that is discharged. Complete and submit a proposal for alternate effluent limits.	December 12, 1992

c. Final Compliance

Tasks	Deadline
Achieve compliance with the selenium effluent limit listed in item 1. above or an alternate to this limit which is approved by the Board and the EPA.	December 12, 1993

3. The Dischargers named below shall develop a CUSUM (cumulative sum) control chart for selenium mass loading. The CUSUM chart shall look at the cumulative sum or difference of the current selenium loadings from the 1990 annual average daily loading. A 12 month running account of these cumulative sums will be maintained and reported with the monthly Self-monitoring Report. This requirement will be in effect until full compliance with the final effluent limit is achieved by December 12, 1993.

Discharger: Shell, Union, Exxon, Tosco, Pacific, Chevron

4. The above dischargers will coordinate their investigations relative to proposing any selenium effluent limits to the extent possible with the Board's Regional Effects Monitoring Program, and with the Local Effects Monitoring Programs located within their individual NPDES permits.

B. This Order shall serve as an amended National Pollutant Discharge Elimination System permit pursuant to Section 402 of the Federal Water Pollution Control Act, or amendments thereto, and shall take effect at the end of ten days from the date of hearing provided the Regional Administrator, EPA, has no objections.

I, Steven R. Ritchie, Executive Officer, do hereby certify the foregoing is a full, true and correct copy of an order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on February 20, 1991.

/s/ Steven R. Ritchie
STEVEN R. RITCHIE
Executive Officer

APPENDIX 4

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN FRANCISCO BAY REGION

ORDER NO. 94-015

CEASE AND DESIST ORDER

SHELL OIL COMPANY
Martinez, Contra Costa County
UNION OIL COMPANY OF CALIFORNIA
Rodeo, Contra Costa County
EXXON COMPANY, U.S.A
Benicia, Solano County

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter called the Regional Board) finds that:

1. Shell Oil Company ("Shell"), Union Oil Company of California ("Unocal"), and Exxon Company, U.S.A. ("Exxon"), hereinafter collectively referred to as the dischargers, operate petroleum refineries that discharge wastewater into the Carquinez Straits and Suisun Bay.

2. On February 20, 1991, the Regional Board issued Order No. 91-026 amending the dischargers' existing National Pollutant Discharge Elimination System (NPDES) Permits to include a concentration-based effluent limitation for selenium of 50 ppb (daily maximum) and a mass-based limitation, expressed in pounds per day, equivalent to 50 ppb times the flow rate for each discharger, as determined on an annual average basis. These limitations, referred to as Individual Control Strategies (ICS), were issued to the dischargers pursuant to state authority under the NPDES program and as a result of the "short listing" of San Pablo Bay, Carquinez Strait and Suisun Bay

(hereinafter generally referred to as "the Bays") under section 304(l) of the federal Clean Water Act as impaired water bodies for selenium. The listing decision was made by the U.S. Environmental Protection Agency on September 28, 1990.

3. The 1986 Basin Plan for the San Francisco Bay Region established effluent limitations for discharge to the estuary based on the lower of fresh or salt water objectives, due to fluctuating salinities. The 1986 Basin Plan also established the pattern of calculating effluent limitations for deep water dischargers based on a dilution credit of 10:1. In other words, the adopted effluent limitations for deep water discharges were, for the most part, ten times the objective. In 1987, the US Environmental Protection Agency promulgated water quality criteria for selenium, based on the protection of aquatic life, of 5 ug/L for fresh waters, and 71 ug/L for marine waters, as four day average values. On April 11, 1991 the State Water Resources Control Board adopted the Inland Surface Waters Plan and the Enclosed Bays and Estuaries Plan, which established water quality objectives for selenium of 5 ug/L for fresh waters and 71 ug/l for marine waters, and stated that the objectives in the Inland Surface Waters Plan shall apply to freshwater portions of enclosed bays and estuaries. On September 16, 1992 the Regional Board adopted amendments to the Basin Plan. These amendments established that the dilution credit for deep water discharges is limited to 10:1, and established an effluent limitation of 50 ug/L for selenium for deep water discharges for both fresh and marine waters. The reliance on the fresh water objective for the entire estuary was based on the potential for bioaccumulation of selenium, evidenced in part by the health advisory limiting consumption of diving ducks from Suisun

Marsh, due to elevated tissue levels of selenium. These portions of the Basin Plan amendments were approved by the State Water Resources Control Board on April 27, 1993 and have not yet been considered by the Office of Administrative Law.

On December 22, 1992, the US Environmental Protection Agency issued a final rule (40 CFR 131.36), also known as the National Toxics Rule, which established a criteria of 5 ug/L for the waters of San Francisco Bay to and including Suisun Bay and the Sacramento-San Joaquin Delta. The final rule states that "the fresh water selenium criteria are included for the San Francisco Bay estuary because high levels of bioaccumulation of selenium in the estuary indicate that the salt water criteria are underprotective for San Francisco Bay". This rule became effective February 5, 1993.

4. The effluent limitations imposed under Order No. 91-026 become effective on December 12, 1993. For reasons explained below, the dischargers will not be able to achieve compliance with the selenium limits by the date specified in Order No. 91-026 and are therefore threatening to violate the order. The Regional Board is adopting this Order to enforce the provisions of Order No. 91-026.

5. On June 19, 1991, the Regional Board issued Order No. 91-099, further amending the dischargers' NPDES permits to include immediately effective interim selenium discharge limits calculated on the basis of each refinery's "current performance," as defined in the order. These interim limits continue to apply until the limits imposed in Order No. 91-026 are achieved.

6. The Western States Petroleum Association ("WSPA") and the six Bay Area refiners (Shell, Unocal, Exxon, Chevron, Tosco and Pacific Refining) filed a Petition

for Review with the State Water Resources Control Board on March 22, 1991, challenging the issuance of the ICS's and the underlying listing of the Bays under Section 304(l) of the Clean Water Act on the grounds that the "applicable water quality standard," as defined under section 304(l), was not violated in the Bays and that the Board's action in issuing the ICS's was unlawful and improper. Petitions for Review were also filed by Citizens for a Better Environment and the Pipe Trades Council of Northern California. On September 16, 1992, the State Board dismissed without prejudice all Petitions for Review, stating that the Regional Board was scheduled to consider the issues raised in the petitions, including site-specific objectives for selenium in the designated water bodies and schedules for compliance with the objectives.

7. On October 16, 1992, WSPA and the six Bay Area refineries filed a Petition for Writ of Mandate in Superior Court for the County of Solano, seeking to set aside the ICS's and the underlying Clean Water Act listing of the Bays. This action is currently pending, but will be dismissed upon adoption of this Order.

8. In 1987, Chevron was required to determine the source of selenium in its effluent and develop all reasonable measures to limit selenium discharge as a condition of its NPDES permit. In 1990, Shell, Unocal, Exxon, and Pacific Refining were required to investigate and evaluate all feasible source control measures, process changes, and treatment options for reducing selenium effluent concentrations to 1, 10, and 50 ppb pursuant to their NPDES permits. These studies determined that the primary source of selenium in refinery effluent was the crude oil. A natural component of the crude, selenium is found

in varying levels in different types of crude. The heavy crudes produced in the San Joaquin Valley of California contain high concentrations of selenium (~ 400-600 ppb) relative to crudes from other parts of the world (~ 50-250 ppb). For the most part, the Bay Area refineries have been designed to use San Joaquin Valley heavy crude for a significant percentage of their total crude intake.

The Regional Board reviewed information presented by the dischargers and has determined that a combination of process and treatment options are the most likely means of achieving the required loading reductions in the shortest period of time. This conclusion was based on an estimate that the maximum possible emission reduction that could be achieved by crude substitution would likely be less than required loading reductions, would take longer to accomplish, and would result in adverse economic impacts to oil producers and the surrounding community, compared to the proposed treatment technology implementation schedule.

9. Despite extensive research and testing by the six Bay Area refiners at a cost exceeding $5 million, at present there is no known technology that is capable of removing selenium from refinery wastewater in a manner that does not produce large quantities of hazardous waste. The only technologies that have been shown to have any promise (iron co-precipitation and selective resin adsorption) would generate very large quantities of selenium-laden sludge (as much as 14 tons per day, depending on the refinery) which would be classified as a hazardous waste in California. The sludge would be subject to land disposal restrictions under the state Hazardous Waste Control Law and would itself have to be treated to

remove or stabilize the selenium prior to land disposal.

10. In addition, after bench- and pilot-scale testing, neither iron co-precipitation nor selective resin adsorption has been shown to be effective in reducing selenium in refinery wastewater to 50 ppb on a consistent basis for all refineries.

11. WSPA has commenced a $1.3 million research study (hereinafter called the "Technology Study") in a further, more comprehensive effort to identify a technology or technologies that are capable of removing selenium from refinery wastewater in a reliable and environmentally acceptable manner. The Technology Study consists of selenium speciation studies, selenium source studies, selenium fate studies and selenium removal studies, as described below.

    As discussed in WSPA's proposal to the Regional Board staff, the form of selenium in the sour water and stripped sour water is still not fully understood. The first phase of this project will attempt to identify or at least characterize the selenium in these streams, as well as develop or refine techniques for quantifying the selenium species most likely to be present. Knowledge of the selenium species is critical to developing and improving the effectiveness of promising selenium removal processes. Speciation work under the WSPA study began in August 1993 and is being performed by Brown and Caldwell, with subcontracts to the California Public Health Foundation and ANC Research Laboratories. Procedures have been developed and tested on effluent samples for fractionation and quantification of various selenium forms (particulate selenium, neutral- and acid-volatile selenium, and anionic selenium species – selenite, selenate, and selenocyanate). A final report describing the method is currently being

prepared by Brown and Caldwell and will be available for use in the technology development studies. SSW and final effluent samples are currently being analyzed using the speciation method developed.

The process development studies are intended to identify, develop, and demonstrate improvements in the most promising processes that would render them feasible as well as effective. The processes to be developed further include several of the various iron processes (ferric co-precipitation on SSW and biotreater effluent, elemental iron treatment of SSW, and the Unipure process on SSW), alumina (Sorbplus treatment of SSW, and activated alumina treatment of SSW and final effluent), and ion exchange processes.

For the iron process, a suitable pretreatment process (eg. chemical oxidation) for the SSW stream needs to be developed to convert the selenium into the proper species for sorption onto the iron. Treatment of the SSW stream instead of the final effluent would allow for a significant reduction in the volume of water to be treated and the amount of sludge generated. Also, a method for regeneration/reuse of the iron sludge needs to be developed. Preliminary tests conducted by one refinery indicate that sludge washing at high pH may remove greater than 95% of the selenium sorbed to the spent iron sludge. The refineries have no experience with this type of sludge regeneration, and additional testing needs to be done to demonstrate its effectiveness. Finally, a process for treatment or disposal of the small-volume waste stream produced from the regeneration process needs to be developed. Proposals for this work were received in October 1993 and Brown and Caldwell was selected as the contractor. This part of

the project is expected to be complete by October 1994.

For the alumina and ion exchange processes, either a pretreatment step needs to be developed to remove chemical species that compete with selenium for sorption sites, thereby increasing the sorption capacity of the ion exchange material, or regeneration processes need to be developed that would allow the sorbent to be reused. Proposals for study of the ion exchange and alumina processes are currently under review, and a contract will be issued by WSPA in early 1994. Expected completion date for this portion of the project is December 1994.

The WSPA effort will also include a study of biological treatment options for selenium removal. Two approaches will be evaluated – an anaerobic system that converts selenate and selenite to elemental selenium and an aerobic system that converts selenite into cell-bound elemental selenium. The latter has the potential to be used as part of an aerobic treatment system treating selenium-containing stripped sour waters. Montgomery-Watson, the oversight contractor, is currently developing a scope of work to pursue these two approaches. WSPA plans to select a contractor for these studies during spring 1994.

These studies are being conducted on a staggered schedule, with a final completion and reporting date of July 1995. The studies will be expedited, if possible. This schedule is consistent with the two-year duration study originally estimated in WSPA's research proposal. At the conclusion of the study, each refiner will select an appropriate technology (or technologies) for pilot evaluation based on its effectiveness, feasibility, and cost. Pilot-scale testing will be performed on-site at each refinery, and managed

separately by each individual refiner. Pilot test result will be shared and reported on a regular basis to the Regional Board. This will maintain communication lines, and assure that troubleshooting and process refinement efforts are not duplicated. Pilot testing, including design, construction, operation and reporting, is expected to take approximately one year. After successful outcome of a pilot-scale test, the design, engineering, construction and start-up of a full-scale unit is expected to take about two years on an accelerated schedule.

12. WSPA has convened a Task Force for the purpose of monitoring the progress of the Technology Study. Staff of the Regional Board are participating in the Task Force.

13. The Regional Board has proposed an amendment to the Water Quality Control Plan for the San Francisco Bay Region (Basin Plan) which would establish an industry wide, mass emission reduction strategy (MERS) for selenium which is targeted at a level below 50 ppb. The schedule for selenium reductions in the MERS, if adopted, or in any other amendment to the Basin Plan, will not be inconsistent with the schedule for compliance contained in this Order.

14. The Regional Board, WSPA, and the dischargers have reached a settlement of the litigation described in paragraph 7. That settlement includes a term providing that the dischargers shall pay the Regional Board the sum of $1 million within 30 days of adoption of this Order and $1 million on January 31, 1995. The Regional Board has considered the various enforcement and penalty options available to it regarding violation of Order No. 91-026, including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for

civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

15. This Order is an action to enforce the laws and regulations administered by the Regional Board. This action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to Section 15321, Title 14, California Code of Regulations.

16. The Regional Board has notified the dischargers and interested agencies and persons of its intent under California Water Code Section 13301 to consider the adoption of a Cease and Desist Order for the threatened discharge and has provided them with an opportunity for a public hearing and an opportunity to submit their written views and recommendations.

17. The Regional Board, in a public hearing, heard and considered all comments pertaining to the threatened discharge.

IT IS HEREBY ORDERED, pursuant to Section 13301 of the California Water Code, that Shell Oil Company, Union Oil Company of California, and Exxon Company, U.S.A. shall cease and desist from discharging waste in violation of Order No. 91-026 by complying with the following:

1. The dischargers shall ensure implementation of the Technology Study or a comparable study. The goal of such study is to identify suitable technologies capable of removing selenium from refinery discharges. The scope of the study shall encompass evaluation of all promising technologies, including those which might be capable of achieving concentration-based limits significantly below 50 ppb, identify the most

feasible of these, and communicate the precise decision criteria by which feasibility was determined.

2. The dischargers shall ensure that the Task Force make reports to the Regional Board every six months on the progress of the Technology Study and share such other information concerning control of selenium as may become available. These reports shall at a minimum describe a) the status of the most promising technologies; b) decisions made since the previous progress report regarding continuing or discontinuing research on a particular technology and the rationale for doing so; c) summary of work at individual refineries relevant to and/or used during the Technology Study including but not limited to studies addressing selenium mass balances throughout individual refinery systems, the fate and removal of selenium in currently operating biological treatment systems, pilot scale studies, and any other research conducted at individual sites; and d) projected schedules and status of pilot tests and implementation measures at each refinery. These reports shall be presented by the dischargers at public meetings or workshops as determined by the Executive Officer.

3. Compliance with this Order shall be in accordance with the following tasks and time schedules:

   a. The dischargers shall complete the Technology Study or a comparable study no later than July 31, 1995.

   b. The dischargers shall initiate pilot tests of candidate selenium removal technologies or alternative control strategies no later than December 31, 1995.

   c. The dischargers shall implement a removal technology or technologies, or an alternate

control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in Order No. 91-026 and shall comply with these limits, no later than July 31, 1998.

d. In addition to evaluating treatment options through the Technology Study, the dischargers shall also evaluate and report on all promising process changes which may also significantly reduce selenium mass discharge. At a minimum, each refinery shall evaluate and report on selenium mass emission reduction by (a) using recycled sour water in existing or planned coking systems; (b) enhancing the removal efficiency of existing biotreatment systems; and (c) reuse of sour water and other selenium-containing waste streams in any other appropriate processes.

Each discharger shall submit a schedule to the Regional Board by April 1, 1994 for evaluating and reporting on (a), (b), and (c) above.

4. In the event a discharger is successful in identifying and piloting a workable selenium removal technology or other control strategy in advance of the schedule set forth in Provision 3, the discharger shall, to the extent feasible, accelerate the implementation of such technology or control strategy so as to achieve compliance with the 50 ppb limit in advance of the July 31, 1998 deadline.

5. In the event a discharger is unable by July 31, 1998, to identify or implement a workable removal technology or other control strategy, either through the Technology Study or its own internal efforts, an

extension of the final compliance date will be considered and may be granted based on information regarding technological availability and demonstration of a good faith effort to achieve compliance.

6. During any period of extension granted under Provision 5, the discharger shall continue to use all reasonable efforts to identify or implement a workable selenium removal technology or other control strategy, consistent with the efforts required by this Order. The discharger shall provide the Regional Board with quarterly status reports on its progress in achieving compliance.

7. If the Executive Officer finds that the dischargers have failed to comply with the provisions of this Order, he is authorized after approval of the Regional Board Chairman, to request the Attorney General to take appropriate action against the dischargers, including injunctive and civil remedies, if appropriate, or to issue a Complaint for Board consideration of Administrative Civil Liabilities.

8. Each discharger shall maintain a copy of this Order at its facility so as to be available at all times to facility operating personnel.

9. If any discharger is delayed, interrupted or prevented from meeting one or more of the time schedules in this Order due to circumstances beyond their reasonable control, the discharger shall promptly notify the Executive Officer. In the event of such delays, the Regional Board will consider modification of the time schedules established in this Order.

10. This Order shall be effective on January 19, 1994.

I, Steven R. Ritchie, Executive Officer, do hereby certify the foregoing is a full, true and correct copy of an Order

of the California Regional Water Quality Control Board, San Francisco Bay Region, on January 19, 1994.

/s/ Steven R. Ritchie
STEVEN R. RITCHIE
Executive Officer

APPENDIX 5

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Regional Water Quality Control Board and
State Water Resources Control Board

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

WESTERN STATES PETROLEUM ASSOCIATION, et al., Petitioners, v. CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, et al., Respondents,	No. 121078 STIPULATION FOR SETTLEMENT AND DISMISSAL OF ACTION (Filed Mar. 2, 1994)

WHEREAS on October 16, 1992, the Western States Petroleum Association ("WSPA"), Chevron U.S.A. Inc., Exxon Company U.S.A., Pacific Refining Company, Shell Oil Company, Tosco Corporation, and Union Oil Company of California (dba Unocal) filed a verified Petition

for Writ of Mandate in the Superior Court of the State of California, County of Solano (No. 121078), seeking review of the listing of San Pablo Bay, Suisun Bay and the Carquinez Strait ("the Bays") as impaired water bodies under Section 304(*l*) of the federal Clean Water Act and of two orders issued by the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Board") amending the refinery petitioners' NPDES permits to include, respectively, final and interim selenium discharge limits (Order No. 91-026 and 91-099);

WHEREAS, Chevron, Tosco and Pacific Refining are currently in compliance with the final discharge limit;

WHEREAS, the parties wish to avoid the burden and uncertain outcome of litigation and resolve their differences through negotiation;

WHEREAS the parties have negotiated terms upon which this litigation may be settled; and

WHEREAS the parties have made the terms of this settlement available for public review and comment for a period of not less than 30 days prior to final action thereon by the Regional Board,

NOW, THEREFORE, the parties do agree and stipulate as follows:

1. As part of the settlement of this litigation, the refinery petitioners agree to comply with the terms of Order Nos. 91-026 and 91-099, as effectively modified by this stipulation and by the Cease and Desist Order that is attached hereto as Exhibit A and is adopted by the Regional Board as part of this settlement.

2. Limitations on selenium discharges more stringent than those contained in the current NPDES permits for Chevron, Tosco or Pacific Refining shall not become effective prior to July 31, 1998.

3. Pending compliance with the 50 ppb selenium discharge limit by Shell, Exxon and Unocal, said refineries shall comply with their respective interim limits as specified in Order 91-099. Said interim limits shall not be modified prior to July 31, 1998. Nothing in this agreement precludes the Regional Board from bringing an enforcement action in the event of a violation of the terms of Order No. 91-099 by any discharger subject thereto.

4. As part of this settlement, Shell, Exxon and Unocal shall collectively pay the Regional Board the sum of $2 million in accordance with the following schedule: $1 million within 30 days after adoption of the Cease and Desist Order that is Exhibit A hereto and $1 million on January 31, 1995. Out of each payment, $100,000 shall be made payable to the state of California Water Pollution Cleanup and Abatement Account and $900,000 shall be made payable to the California Department of Justice. The checks shall be delivered to M. Anne Jennings, Deputy Attorney General, Office of the Attorney General, 2101 Webster Street, 12th Floor, Oakland, CA 94612. Monies payable to the Department of Justice shall be deposited in the California Department of Justice Special deposits Fund into an account to be established, hereinafter referred to as the "Selenium Mitigation Fund." The purpose of the Selenium Mitigation Fund shall be to (a) fund studies of the fate and transport of pollutants in the San Francisco estuary, (b) fund expert consultants to assist the Regional Board in reviewing the progress and

products of the Technology Study referenced in the Cease and Desist Order attached as Exhibit A, and provide advice to the Regional Board regarding said study, and (c) fund projects for the protection and/or enhancement of habitat in the San Francisco estuary which have been affected by selenium. Payments from the Selenium Mitigation Fund shall be made directly to suitable contractors or entities performing such work, as specified by the Regional Board. Any monies that have not been expended or committed by December 31, 1997 shall be paid by the California Department of Justice to the State of California Water Pollution Cleanup and Abatement Account, State Water Quality Control Fund.

5. Adoption of the Cease and Desist Order that is attached hereto as Exhibit A is an integral part of the settlement of this litigation. Petitioners agree not to appeal the adoption of said order.

6. Upon adoption of the Cease and Desist Order attached as Exhibit A hereto, petitioners shall dismiss this action without prejudice; however, petitioners agree that they will not initiate litigation with respect to any claims raised in the petition unless they are unable to secure relief under paragraph 5 of the Cease and Desist Order attached hereto as Exhibit A. Nothing in this agreement shall be construed as a waiver of any petitioner's rights to challenge said Cease and Desist Order or Order No. 91-026 pursuant to the provisions of the second sentence of section 13330(a) of the Water Code in any enforcement action brought to enforce the 50 ppb discharge limitation for selenium.

IT IS SO STIPULATED AND AGREED:

DANIEL E. LUNGREN, Attorney General of the State of California
WALTER E. WUNDERLICH
Assistant Attorney General
M. ANNE JENNINGS
Deputy Attorney General
Attorneys for Respondents

Dated: 1/11/94

By: /s/ M. Anne Jennings
M. ANNE JENNINGS
Deputy Attorney General
(Approved as to form)

CALIFORNIA WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

Dated: 2/9/94

By: /s/ Steven R. Ritchie
STEVEN R. RITCHIE
Executive Officer

STATE WATER RESOURCES CONTROL BOARD

Dated: 2/2/94

By: /s/ W. R. Attwater

PILLSBURY, MADISON & SUTRO
MARGARET ROSEGAY
SARAH FLANAGAN
Attorneys for Western States Petroleum Association et al.

Dated: 3/1/94

By /s/ Margaret Rosegay
Margaret Rosegay
(Approved as to form)

WESTERN STATES PETROLEUM ASSOCIATION

Dated: 1/24/94 By: /s/ Douglas F. Henderson
EXXON COMPANY, U.S.A.

Dated: 02/08/94 By: /s/ Gary W. Pruessing
SHELL OIL COMPANY

Dated: 1/28/94 By: /s/ R F Andrews
UNION OIL COMPANY OF CALIFORNIA

Dated: 1/28/94 By: /s/ S Plesh
CHEVRON U.S.A. INC.

Dated: 2/3/94 By: /s/ M D Hannam
PACIFIC REFINING COMPANY

Dated: 2/3/94 By: /s/ R.J. Edward for Paul Miller 2/3/94
TOSCO CORPORATION

Dated: 1/28/94 By: /s/ D V Manning

APPENDIX 6

33 U.S.C. § 1319. ENFORCEMENT

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section [sic] 1311, 1312, 1316, 1317, 1318, 1238, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally

assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person –

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [sic] 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time

extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * *

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available –

(A) the Administrator finds that any person has violated section [sic] 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notices of the

Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section [sic] 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator, or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations,

and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a

penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this

subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation –

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection.

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be.

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which –

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

* * *

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1314. Information and guidelines

* * *

***(l)* Individual control strategies for toxic pollutants**

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection –

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section

1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

* * *

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation,

or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply an appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * *

28 U.S.C. § 1292. Interlocutory decisions

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

* * *

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is

hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall

continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each state desiring to administer its own

permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating,

anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * *

APPENDIX 7

§ 401.15 Toxic pollutants.

The following comprise the list of toxic pollutants designated pursuant to section 307(a)(1) of the Act:

1. Acenaphthene
2. Acrolein
3. Acrylonitrile
4. Aldrin/Dieldrin[1]
5. Antimony and compounds[2]
7. Asbestos
8. Benzene
9. Benzidine[1]
10. Beryllium and compounds
11. Cadmium and compounds
12. Carbon tetrachloride
13. Chlordane (technical mixture and metabolites)
14. Chlorinated benzenes (other than dichlorobenzenes)
15. Chlorinated ethanes (including 1,2-dichloroethane, 1,1,1-trichloroethane, and hexachloroethane)
16. Chloroalkyl ethers (chloroethyl and mixed ethers)
17. Chlorinated naphthalene
18. Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols)
19. Chloroform
20. 2-chlorophenol
21. Chromium and compounds
22. Copper and compounds
23. Cyanides
24. DDT and metabolites[1]

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[1] Effluent standard promulgated (40 CFR part 129).

[2] The term *compounds* shall include organic and inorganic compounds.

25. Dichlorobenzenes (1,2-, 1,3-, and 1,4-dichlorobenzenes)
26. Dichlorobenzidine
27. Dichloroethylenes (1,1-, and 1,2-dichloroethylene)
28. 2,4-dichlorophenol
29. Dichloropropane and dichloropropene
30. 2,4-dimethylphenol
31. Dinitrotoluene
32. Diphenylhydrazine
33. Endosulfan and metabolites
34. Endrin and metabolites[1]
35. Ethylbenzene
36. Fluoranthene
37. Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, bromophenylphenyl ether, bis(dichloroisopropyl) ether, bis(chloroethoxy) methane and polychlorinated diphenyl ethers)
38. Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane
39. Heptachlor and metabolites
40. Hexacholrobutadiene
41. Hexachlorocyclohexane
42. Hexachlorocyclopentadiene
43. Isophorone
44. Lead and compounds
45. Mercury and compounds
46. Naphthalene
47. Nickel and compounds
48. Nitrobenzene
49. Nitrophenols (including 2,4-dinitrophenol, dinitrocresol)
50. Nitrosamines
51. Pentachlorophenol
52. Phenol
53. Phthalate esters

54. Polychlorinated biphenyls (PCBs)[1]
55. Polynuclear aromatic hydrocarbons (including benzanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenzanthracenes, and indenopyrenes)
56. Selenium and compounds
57. Silver and compounds
58. 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD)
59. Tetrachloroethylene
60. Thallium and compounds
61. Toluene
62. Toxaphene[1]
63. Trichloroethylene
64. Vinyl chloride
65. Zinc and compounds

[44 FR 44502, July 30, 1979, as amended at 46 FR 2266, Jan. 8, 1981; 46 FR 10724, Feb. 4, 1981]

APPENDIX 8

* * *

Cal. Water Code § 13301. Cease and desist orders

When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302.

(Added by Stats.1969, c. 482, p. 1066, § 18, operative Jan. 1, 1970. Amended by Stats.1970, c. 918, § 5.2; Stats.1971, c. 1288, p. 2525, § 10.)

* * *

Cal. Water Code § 13320. Review of action of regional boards; evidence; action by state board; disputes between regional boards; resolution

(a) Within 30 days of any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.5 (commencing with Section 13370), or Chapter 7 (commencing with Section 13500), any aggrieved person may petition the state board to review such action or failure to act. In case of failure to act, the 30-day period shall commence upon refusal of the board to act, or 60 days after request has been made to the board to act. The state board may, on its own motion, at any time review such action or failure to act and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4.

(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the

foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division.

(d) In the event a waste discharge in one region affects the waters in another region and there is any disagreement between the regional boards involved as to the requirements which should be established, either regional board may submit the disagreement to the state board which shall determine the applicable requirements.

(Added by Stats.1969, c. 482, p. 1068, § 18, operative Jan. 1, 1970. Amended by Stats.1969, c. 800, p. 1620, § 4.5, operative Jan. 1, 1970; Stats.1970, c. 902, § 1.5; Stats.1970, c. 956, § 2; Stats.1971, c. 1288, p. 2526, § 12; Stats.1975, c. 888, p. 1967, § 1; Stats.1982, c. 90, p. 292, § 7, eff. March 2, 1982.)

* * *

Cal. Water Code § 13323. Complaint; hearing; action by regional board; orders

(a) Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

(b) The complaint shall be served by personal notice or certified mail, and shall inform the party so served that a hearing shall be conducted within 60 days after the party has been served. The hearing shall be before a panel of the regional board, consisting of three or more

members of the regional board as it may specify, or before the regional board. The person who has been issued a complaint may waive the right to a hearing, in which case the regional board shall not conduct a hearing.

(c) After any hearing, the panel shall report its proposed decision and order to the regional board and shall, at the time it reports its decision to the regional board, supply a copy to the party served with the complaint, the party issuing the complaint, and any other person requesting a copy. Members of the panel may sit as members of the board in deciding the matter. The regional board, after making an independent review of the record and taking such additional evidence as may be necessary and could not reasonably have been offered before the hearing panel, may adopt, with or without revision, the proposed decision and order of the panel.

(d) Orders setting administrative civil liability shall become effective and final upon issuance thereof, and payment shall be made within 30 days. Copies of these orders shall be served by personal service or by registered mail upon the party served with the complaint and upon other persons who appeared at the hearing and requested a copy.

(Added by Stats.1984, c. 1541, § 4. Amended by Stats.1985, c. 148, § 1.)

* * *

Cal. Water Code § 13325. Review by superior court; mandate

Any party aggrieved by a final order issued by the state board under Section 13324 after granting review of a

regional board order may obtain review of the order of the state board in the superior court by filing in the court a petition for writ of mandate within 30 days following the issuance of the order by the state board. Any party aggrieved by a final order of a regional board issued under Section 13323 for which the state board denies review may obtain review of the order of the regional board in the superior court by filing in the court a petition of writ of mandate within 30 days following the denial of review by the state board. If no aggrieved party petitions for writ of mandate within the time provided by this section, an order of the state board or a regional board shall not be subject to review by any court or agency, except that the state board may grant review on its own motion of an order issued under Section 13323 after the expiration of the time limits set by the section.

(Added by Stats.1984, c. 1541, § 4.)

* * *

Cal. Water Code § 13330. Mandate; evidence

(a) Within 30 days after service of a copy of a decision and order issued by the state board under Section 13320, any aggrieved party may file with the superior court a petition for a writ of mandate for review thereof. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of a decision or order of a regional board or the state board in any judicial proceedings brought to enforce such decision or order or for other civil remedies.

(b) The evidence before the court shall consist of the record before the state board, including the regional

board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of this division. In every such case, the court shall exercise its independent judgment on the evidence.

(c) Except as otherwise provided herein, the provisions of subdivisions (e) and (f) of Section 1094.5 of the Code of Civil Procedure shall govern proceedings pursuant to this section.

(Added by Stats.1969, c. 482, p. 1069, § 18, operative Jan. 1, 1970.)

* * *

Cal. Water Code § 13385. Violations; civil liabilities

(a) Any person who violates any of the following shall be liable civilly in accordance with subdivisions (b), (c), (d), (e), and (f):

(1) Section 13375 or 13376.

(2) Any waste discharge requirements or dredged and fill material permit.

(3) Any requirements established pursuant to Section 13383.

(4) Any order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.

(5) Any requirements of Section [sic] 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act, as amended.[1]

(6) Any requirement imposed in a pretreatment program approved pursuant to waste discharge requirements issued under Section 13377 or approved pursuant to a permit issued by the administrator.

(b) Civil liability may be imposed by the superior court in an amount not to exceed the sum of both of the following:

(1) Twenty-five thousand dollars ($25,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed twenty-five dollars ($25) times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

The Attorney General, upon request of a regional board or the state board, shall petition the superior court to impose the liability.

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

---

[1] 33 U.S.C.A. §§ 1311, 1312, 1316, 1317, 1318, 1328, 1345.

(1) Ten thousand dollars ($10,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(d) For purposes of subdivisions (b) and (c), the term "discharge" includes any discharge to navigable waters of the United States, any introduction of pollutants into a publicly owned treatment works, or any use or disposal of sewage sludge.

(e) In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.

(f) For purposes of this section, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(g) Remedies under this section are in addition to, and do not supersede or limit, any other remedies, civil or criminal except that no liability shall be recoverable

under Section [sic] 13261, 13265, 13268, or 13350 for violations for which liability is recovered under this section.

(h) The Attorney General, upon request of a regional board or the state board, shall petition the appropriate court to collect any liability imposed pursuant to this section. Any person who fails to pay on a timely basis any liability imposed under this section shall be required to pay, in addition to that liability plus interest, attorneys' fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which the failure to pay persists. The nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of the person's liability and nonpayment penalties which are unpaid as of the beginning of the quarter.

(i) Funds collected pursuant to this section shall be paid to the State Water Pollution Cleanup and Abatement Account.

(Added by Stats.1987, c. 1189, § 10.)

Cal. Water Code § 13441. Account receipts; expenditures

There is to be paid into the account all moneys from the following sources:

(a) All moneys appropriated by the Legislature for the account.

(b) All moneys contributed to the account by any person and accepted by the state board.

(c) One-half of all moneys collected by way of criminal penalty and all moneys collected civilly under any proceeding brought pursuant to any provision of this division.

(d) All moneys collected by the state board for the account under Section 13304.

APPENDIX 9

[SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA. 94105-3901

Jun 09, 1994

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Re: Settlement in *Western States Petroleum Ass'n, et al. v. Regional Water Quality Control Board, et al.*

Dear Messrs. Ritchie, Lozeau and Karras:

We've been asked to clarify the intent and effect of our December 13, 1993 letter to the RWQCB commenting on the proposed settlement and Cease and Desist Order ("CDO") referenced above.

Although the comment letter describes the payment of money by the refineries as a "penalty," this term was not used with any intention of describing the preclusive effect of that payment under Section 309(g)(6) of the Clean Water Act. 33 U.S.C. § 1319(g)(6). The Region did not make any analysis of whether the settlement and CDO would constitute diligent prosecution under a comparable state law. If we had made such an analysis, we would have had to adhere to the EPA's position regarding section 309(g)(6) as set forth in the attached 1987 and 1993 guidances. (Attachments 1 and 2). The EPA position regarding section 309(g)(6) was also set forth in the EPA amicus brief filed in the *Pendleton Mills* case, *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). (Attachment 3).

I hope that this clarifies the intent and effect of EPA's December 13, 1993 comment letter.

Sincerely,

/s/ Clarence Tenley
Harry Seraydarian
Director
Water Management Division

enc.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
v.
CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AMERICAN FOREST & PAPER ASSOCIATION AMERICAN PETROLEUM INSTITUTE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE CHEMICAL MANUFACTURERS ASSOCIATION INTEGRATED WASTE SERVICES ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Automobile Manufacturers Association, *et al.*, respectfully move this Court for leave to file a brief *amici curiae* in this case in support of the petition for a writ of certiorari filed by Union Oil Company of California ("Unocal"). The petition seeks review of the court of appeals decision in *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996) (reproduced at Pet. App. 1a-17a). Counsel for the petitioner has consented to the filing of the above-mentioned brief *amici curiae*. Counsel for respondents Citizens for a Better Environment-California, *et al.*, withheld consent.*

1. *Amici* are organizations representing a broad cross section of industry in the United States.

* As the reason for withholding consent, respondents' counsel stated that respondents would not be able to reply to *amici*.

Amicus American Automobile Manufacturers Association ("AAMA") is a voluntary nonprofit association of domestic (United States) companies engaged in the manufacture and sale of motor vehicles. AAMA's members operate 276 manufacturing and related facilities, assemble approximately 80% of all motor vehicles produced in the United States, and have approximately 700,000 employees with a total annual payroll of over $35 billion.

Amicus American Forest & Paper Association ("AF&PA") is the national association of the forest, pulp, paper, paperboard, and wood products industry. With approximately 400 member companies and additional related associations, AF&PA represents a vital national industry employing some 1.4 million people and having an annual payroll of approximately $46 billion.

Amicus American Petroleum Institute ("API") is an association of over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. API is a frequent advocate on important issues of public policy before courts, legislative bodies and other forums.

Amicus Bay Area League of Industrial Associations ("BALIA") is a diverse coalition of San Francisco Bay area industries established over 35 years ago for the purpose of addressing a broad range of environmental topics. BALIA represents its members' interests in air and water quality and solid waste management matters before various governmental forums.

Another of the *amici*, the California Council for Environmental and Economic Balance ("CCEEB"), is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate for solutions to achieve California's environmental and economic goals.

Amicus Chemical Manufacturers Association ("CMA") is a non-profit trade association whose members represent more than 90% of domestic (United States) productive

capacity for basic industrial chemicals. CMA regularly advocates on public policy issues of importance to its members that arise before courts, legislative forums and regulatory agencies. The manufacturers of chemicals and allied products provide over one million jobs in the United States and account for over 10% of the value of goods exported from the United States.

Another of the *amici*, the Integrated Waste Services Association ("IWSA"), is a national trade group representing the waste-to-energy industry. IWSA encourages the use of waste-to-energy technology as a key component of community programs to handle solid waste. IWSA's member companies represent 65 of the 114 waste-to-energy facilities nationwide. IWSA member facilities process approximately 83,000 tons of waste each day and generate enough energy to meet the electricity needs of more than one million households.

Finally, *amicus* National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

2. Each of the *amici* has many members who, like petitioner, hold one or more National Pollutant Discharge Elimination System ("NPDES") permits issued pursuant to § 402 of the Clean Water Act ("Act"), 33 U.S.C. § 1342. These permits are administered by the U.S. Environmental Protection Agency ("EPA") and states to which EPA has delegated such permitting authority. NPDES permits regulate the discharge of pollutants to navigable waters of the United States. *See Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203-08 (1976).

While states have primary authority and responsibility to enforce the Clean Water Act, § 505 of the Act, 33 U.S.C. § 1365, also authorizes private enforcement. This case involves a suit under § 505.

Amici are committed to the goals of the Act. To that end, and in coordination with state and federal regulatory authorities, *amici's* member companies have spent vast sums to upgrade and enhance water pollution control technology at their facilities. Nevertheless, *amici's* member companies have been (or presently are) defendants in enforcement suits under § 505 of the Act, or have received notice, pursuant to § 505(b)(1)(A), that an individual or organization intends to file such a suit.

3. The fundamental issue raised by Unocal's petition is whether § 309(g)(6)(A) of the Act, 33 U.S.C. § 1319(g)(6)(A), allows duplicative private enforcement suits to be maintained where the affected state has already prosecuted a comprehensive administrative enforcement action that imposes a sizeable monetary penalty and other relief. *Amici* are directly interested in this case because the court of appeals' misinterpretation of § 309(g)(6)(A) would greatly expand citizens' authority to bring private enforcement suits under the Clean Water Act, and undercut the federalism principles central to the Act. Because *amici's* members are subject to regulation under the Clean Water Act and private enforcement actions under § 505, the issues raised by the instant petition for a writ of certiorari directly affect *amici*. The decision below seriously prejudices *amici's* members by expanding the jurisdiction of the federal courts to NPDES violations that have been fully and aggressively addressed by state enforcement agencies.

In the accompanying brief *amici* address these important issues from the perspective of diverse organizations representing industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understand-

ing of the broader ramifications of the court of appeals decision.

In view of the foregoing, *amici curiae* American Automobile Manufacturers Association, *et al.*, respectively request that they be permitted to file the accompanying brief *amici curiae* in support of petitioner Union Oil Company of California.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AMERICAN FOREST & PAPER ASSOCIATION AMERICAN PETROLEUM INSTITUTE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE CHEMICAL MANUFACTURERS ASSOCIATION INTEGRATED WASTE SERVICES ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

This brief *amici curiae* of American Automobile Manufacturers Association, *et al.*, is submitted in support of a petition for a writ of certiorari filed by Union Oil Company of California ("Unocal"). The petition seeks review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996) (reproduced at Pet. App. 1a-17a).

The court of appeals decision concerns a private enforcement action ("citizen suit") under § 505 of the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1365, and, in particular, interpretation of § 309(g)(6)(A) of the Act, 33 U.S.C. § 1319(g)(6)(A).[1] The Ninth Circuit's decision would allow a private enforcement action to be maintained despite the fact that the affected state has previously undertaken a comprehensive administrative enforcement action resulting in a settlement that imposes a very sizable monetary sanction or penalty. The decision directly conflicts with the decisions of two other circuits, *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995), and *North & South Rivers Watershed Association, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). In addition, the Ninth Circuit's decision directly contravenes Congress' intent—as well as Supreme Court precedent—that individual states are to have the primary role in enforcing the Clean Water Act. The court of appeals decision severely undermines the role intended for state administrative enforcement, including jeopardizing

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[1] The relevant portion of § 309(g) provides as follows:

> (6) Effect of order
>
> (A) Limitation on actions under other sections
>
> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—
>
> ....
>
> (ii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

the opportunity to achieve administrative settlements, while at the same time increasing the likelihood of costly, duplicative and protracted district court litigation. Given the recurring nature of these issues, it is of considerable importance that this Court resolve the conflict among the circuits regarding the respective roles for state enforcement and citizen suits.

The petitioner has consented to the filing of this brief and petitioner's letter of consent has been filed with the Clerk of the Court. Respondents Citizens for a Better Environment, *et al.* ("CBE") have not consented, and *amici* have simultaneously filed a motion for leave to file this brief.

STATEMENT OF INTEREST OF *AMICI*

Amici consist of voluntary business associations representing a broad spectrum of industry in the United States.

Amicus American Automobile Manufacturers Association ("AAMA") is a voluntary nonprofit association of domestic (United States) companies engaged in the manufacture and sale of motor vehicles. AAMA's members operate 276 manufacturing and related facilities, assemble approximately 80% of all motor vehicles produced in the United States and have approximately 700,000 employees with an annual payroll of over $35 billion.

Amicus American Forest & Paper Association ("AF&PA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. AF&PA represents approximately 400 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recycled fiber; and produce solid wood products. Additionally, AF&PA represents a vital national industry which accounts for over 8% of the United States' total manufacturing output. Employing

some 1.4 million people, this industry ranks among the top ten manufacturing employers in 46 states, with an annual payroll of approximately $46 billion.

Amicus American Petroleum Institute ("API") is a trade association whose membership includes over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. API is a frequent advocate on important issues of public policy before courts, legislative bodies and other forums.

Amicus Bay Area League of Industrial Associations ("BALIA") is a diverse coalition of San Francisco Bay area industries established over 35 years ago for the purpose of addressing a broad range of environmental topics. BALIA represents its members' interests in air and water quality and solid waste management matters before various governmental forums.

Another of the *amici*, the California Council for Environmental and Economic Balance ("CCEEB"), is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate for solutions to achieve California's environmental and economic goals.

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Amicus Integrated Waste Services Association ("IWSA") is a national trade group representing the

waste-to-energy industry. IWSA encourages the use of waste-to-energy technology as a key component of community programs to handle solid waste. IWSA's member companies represent 65 of the 114 waste-to-energy facilities nationwide. IWSA member facilities process approximately 83,000 tons of waste each day and generate enough energy to meet the electricity needs of more than one million households.

Amicus National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

Amici have a substantial interest in the issues raised by the petition in this case. The Ninth Circuit's decision will subject Clean Water Act permittees to duplicative enforcement—federal court actions on the heels of state administrative enforcement—for precisely the same conduct.[2] While *amici's* members have invested billions of dollars in water pollution control, no system can guarantee perfect compliance and *amici's* members are at times subject to enforcement actions by state and federal regu-

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[2] The 1972 amendments to the Clean Water Act established the National Pollutant Discharge Elimination System ("NPDES"). The NPDES program is based on a system of permits that regulate the discharge of pollutants into navigable waters of the United States. The permit system is administered by the U.S. Environmental Protection Agency ("EPA") and the various states, including California, to which administration of the permit program has been delegated. *See* § 402 of the Act, 33 U.S.C. § 1342; *see also EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205-08 (1976). At this time there are 39 states with delegated authority to administer the NPDES program and more than 75,000 NPDES permits in effect. http://www.epa.gov:80.

lators. But as a consequence of the Ninth Circuit's decision, NPDES permittees who settle enforcement actions with state agencies will nevertheless be subject to citizen suits—and additional penalties—for the very same matters. This is true even if these permittees make continuing good faith efforts to achieve compliance with permit requirements and pay administrative penalties as part of the resolution of enforcement proceedings.

The Ninth Circuit's decision will significantly erode the incentive for defendants to settle state administrative actions by offering significant environmental improvements and the payment of substantial penalties where a duplicative citizen suit looms on the horizon. These issues, which underlie the petition for a writ of certiorari, are important and recurring questions in the administration of the Clean Water Act and merit review by this Court.

REASONS FOR GRANTING THE WRIT

Unocal's petition addresses the fundamental issue of the respective roles in CWA enforcement that Congress intended for states and citizen plaintiffs. The question presented is whether Congress intended that citizen plaintiffs could bring an enforcement action under the Clean Water Act where a prior state administrative action has resulted in a substantial monetary penalty, the development of new control technology and strict adherence to compliance schedules. The Ninth Circuit's decision is contrary to this Court's conclusion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that citizen suits,

> are proper only "if the Federal, State, and local agencies *fail* to exercise their enforcement responsibility."

Id. at 60 (emphasis added) (quoting S. Rep. No. 92-414, at 64 (1971)). The Ninth Circuit allows an entirely duplicative citizen suit to proceed in federal court despite

the fact that the identical issues have been thoroughly addressed in a prior administrative enforcement proceeding before the California Regional Water Quality Control Board ("Regional Board") under a state enforcement code that is "comparable" to the provisions of the CWA governing EPA's administrative enforcement. The Ninth Circuit disregards these factors and, as a consequence, undermines federalism and a principal theme of the CWA —the primary authority and responsibility of the states in enforcement of the Clean Water Act.

A. Contrary To The Ninth Circuit, The Regional Board's Enforcement Process Fully Satisfies § 309(g)'s "Comparability" Standard

The Ninth Circuit concluded that the Regional Board's enforcement action against Unocal did not proceed under a "comparable State Law" within the meaning of § 309(g)(6)(A)(iii) of the Clean Water Act. That conclusion is based on the erroneous premise that the CWA requires the Regional Board to proceed under enforcement provisions that are identical to the CWA provisions governing EPA's administrative enforcement under § 309(g).

1. *In 1987 Congress Made a Deliberate Policy Choice To Limit Citizen Suits Where a State Enforces Administratively*

The purpose of § 309(g)(6)(A) is to avoid duplicative enforcement actions by citizen plaintiffs where there has already been diligent administrative enforcement by either the affected state or the federal government. Prior to the 1987 amendments to the CWA only a state or federal judicial enforcement action could bar a duplicative citizen suit for the same alleged NPDES violations.[3] The 1987

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[3] *See Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985). Prior to the 1987 amendments that added § 309(g), the CWA's only provision for barring a duplicative citi-

amendments expanded the limitation on citizen suits to include state and federal administrative enforcement. The amendments established that state administrative enforcement actions would thereafter preclude duplicative citizen suits, provided that the state's administrative enforcement procedures are comparable to the CWA's procedures for EPA administrative enforcement, *e.g.*, public participation, the availability of monetary penalties, and opportunity for judicial review.[4] It bears emphasis that the plain meaning of the term "comparable" in the statute is that a state's administrative enforcement procedures are "similar" or "analogous"—but not necessarily identical—to the section 309(g) procedures that apply to administrative enforcement by EPA.[5] Clearly, Congress did not intend to impose a litmus test or exalt form over substance.

The Ninth Circuit, however, ignored the direction of Congress in the 1987 amendments and disregarded the plain language of the statute. Nowhere does the court explain why the Regional Board's administrative enforcement procedures in this case were not comparable to the administrative enforcement procedures that apply to EPA under § 309(g). To the contrary, the procedures fol-

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zen suit was set forth in § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B), which precludes a citizen suit if at the time of the suit an enforcement action in state or federal court is being diligently prosecuted by the affected state or EPA. The 1987 amendments that added § 309(g) also made a conforming amendment to § 505(a) to clarify that citizen suits would thereafter be precluded both by judicial enforcement (§ 505(b)(1)(B)) *and* administrative enforcement (§ 309(g)(6)(A)).

[4] The 1987 amendments added administrative penalty provisions to EPA's CWA administrative enforcement authority, which had previously been limited to issuance of compliance orders. *See, e.g.*, 33 U.S.C. § 1319(g)(1)-(5).

[5] *See* 133 Cong. Rec. S733 (daily ed. Jan. 14, 1987) (comments of Sen. Chafee that a state's administrative procedures must be "similar" or "analogous" to those in § 309(g)).

lowed by the Regional Board were quite similar or analogous to those set forth in CWA § 309(g). The Ninth Circuit suggested that the provision relied on in this case by the Regional Board, § 13301 of the California Water Code, provides "no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude." Pet. App. 12a. That position is baseless. The Regional Board, acting pursuant to § 13301 and related authority, provided abundant public notice and opportunity to comment, held two public hearings (CBE actively participated in both), and imposed a very substantial monetary sanction—a penalty—of $2,000,000 ($780,000 of which was paid by Unocal). *See* Pet. at 4-5.

The Ninth Circuit concluded that Unocal's $780,000 payment did not qualify as an enforcement penalty under § 309(g)(6)(A)(iii), suggesting that the "fairest characterization of the payment at issue is that it was, indeed, a settlement made to *avoid an enforcement* action by the Regional Board" and accordingly, was "not paid [as] a penalty." Pet. App. 9a (emphasis added). The Regional Board's proceeding against Unocal was an enforcement action, however, and was recognized as such by both the Regional Board and EPA. Excerpts of Record ("ER") 158, 253. The Regional Board and EPA also recognized that the $2,000,000 payment was a penalty. ER 140, line 5; ER 253-54; ER 371, lines 8-15.

Disregarding these facts, the Ninth Circuit emphasized instead that § 13301 of the California Water Code, unlike § 13385 of the Code, does not expressly authorize the assessment of administrative penalties. The court further suggested that the result of the Regional Board's reliance on § 13301 was to provide Unocal with "significant advantages" because the "significant level of scrutiny" that is applied to administrative penalties under § 13385 was avoided. Pet. App. 8a. Contrary to the Circuit's implica-

tion, however, neither CBE nor any other participant in the Regional Board's enforcement proceeding suggested that the Board's reliance on § 13301 rather than § 13385 had reduced or otherwise impaired the level of scrutiny associated with the Regional Board's assessment of the $2,000,000 penalty. The penalty paid by Unocal (and the other refiners) was very carefully scrutinized by the Regional Board, EPA, the respondents, and other members of the public, including two public hearings in which respondents fully participated. ER 113-52; ER 253-54; ER 371, lines 8-15. Indeed, the portion of the $2,000,000 penalty that Unocal itself paid ($780,000) was five times the maximum administrative penalty available under the comparable Clean Water Act provision.

2. *The Ninth Circuit's Decision Conflicts with Decisions of the First and Eighth Circuits*

The Ninth Circuit's conclusion that § 13301 of the California Water Code is not "comparable" to § 309(g) of the Clean Water Act conflicts with each of the two other court of appeals decisions that have interpreted that provision. The federal courts interpreting § 309(g)(6)(A) recognize that the Clean Water Act's "comparability" requirement is satisfied where the state's enforcement procedures are similar to federal enforcement procedure:

> The common thread running through these cases is a finding that the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA. . . . [T]he comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Arkansas Wildlife, 29 F.3d at 381. Thus, "while not identical," state administrative enforcement procedures must be "sufficiently similar" to federal procedures to satisfy § 309(g)(6)(A)'s comparability standard.[6] These decisions emphasize "the comparability of the overall state regulatory scheme rather than the individual section of state law," *Arkansas Wildlife Fed'n v. Bekaert Corp.*, 791 F. Supp. 769, 774-75 (W.D. Ark. 1992), which is satisfied where "the overall scheme of the two acts [the CWA and the parallel state law] is aimed at correcting the same violations, thereby achieving the same goals." *North & S. Rivers*, 949 F.2d at 556. In sum, the Ninth Circuit's decision is inconsistent with these principles and creates a split of authority on an important issue with significant consequences for *amici* and others.

B. The Ninth Circuit Sanctions Collateral Attack On State Enforcement, Thereby Jeopardizing The Primary Role Of The States In Enforcement Of The Act

As this Court has long recognized, a principal congressional policy underlying the Clean Water Act is " 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.' " *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 207-08 (quoting § 101(b) of the Act, 33 U.S.C. § 1251(b)). As this Court and other courts have recognized, the legislative history and implementation of the Act repeatedly emphasize Congress' intent that states have preeminent responsibility for the Act's enforcement. *Gwaltney*, 484 U.S. at

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[6] *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 755 F. Supp. 484, 486 (D. Mass. 1991), *aff'd*, 949 F.2d 552 (1st Cir. 1991); *see also Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1886, 1188 (N.D. Ala. 1988) (providing that a "a state administrative action under a similar state law is clearly sufficient, such action being under a state law comparable to subsection (g) of § 1319"), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990).

60.[7] In contrast, citizen suits are intended to "supplement rather than to supplant" government enforcement, and "are proper only 'if the Federal, State, and local agencies *fail* to exercise their enforcement responsibility.'" *Gwaltney*, 484 U.S. at 60.[8]

The Ninth Circuit's decision, however, expands the role of federal court citizen suits at the expense of state authority. Allowing vigorous state administrative enforcement actions that assess substantial penalties to be subordinated and confined to an inconsequential role will seriously undermine state enforcement of the Clean Water Act. As a consequence, settlement of administrative enforcement actions will lack finality and may have little, if any, significance, regardless of procedures for public participation and judicial review, authority to impose stringent penalties and corrective measures, or the severity of the sanctions imposed. This can only result in discouraging out-of-court settlements between NPDES permittees and state agencies since the "incentive to settle would be greatly diminished if subsequent citizen suits were allowed." *Connecticut Coastal Fishermen's Ass'n*, 777 F. Supp. at 186.[9]

In the truest sense, the Ninth Circuit decision validates a collateral attack on the Regional Board's enforcement

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[7] *See also Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 177-78 (D. Conn. 1991), *aff'd in rel. part & rev'd in part on other grounds*, 989 F.2d 1305 (2d Cir. 1993); *EPA v. City of Green Forest*, 921 F.2d 1394, 1403-05 (8th Cir. 1990).

[8] Quoting S. Rep. No. 92-414, at 64 (1971) (emphasis added); *see also Gwaltney*, 484 U.S. at 53 ("[i]n the absence of federal or state enforcement, private citizens may commence civil actions" under § 505).

[9] *See also Saboe v. Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) (a violator will not cooperate with the administrative enforcement process absent "assurance that the same violation would not be the subject of a citizens suit in federal court at some later time").

discretion and the diligently prosecuted enforcement action against Unocal. CBE actively participated in the Regional Board's enforcement proceeding, ER 43-60; ER 113-52; ER 153-59; ER 253-55, and advocated that larger penalty payments be imposed, ER 137-38. CBE could have sought further administrative review by the California Water Resources Control Board and judicial review in the California courts. *See* Cal. Water Code §§ 13320, 13330. Instead, CBE made a conscious decision to ignore these comprehensive state remedies. CBE's choice is strikingly similar to the circumstances in the *Arkansas Wildlife* case, in which the Eighth Circuit concluded "AWF could have intervened in the administrative process but instead chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation . . . ." 29 F.3d at 382. The same holds true for CBE.

Finally, by allowing CBE to maintain another duplicative enforcement action the Ninth Circuit disregards this Court's admonition in *Gwaltney*, 484 U.S. at 60-61, that states have primary authority and discretion to enforce the Act.[10] In short, the federal court suit at issue here, which is entirely duplicative of the State of California's diligent administrative enforcement action against Unocal and others, should have been dismissed. Simply stated:

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[10] *See also* William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 5-8 (1993):

> Federal courts were intended to complement state court systems, not supplant them.
>
> . . . .
>
> . . . In determining the proper allocation of jurisdiction between state and federal courts, we need to view our federal and state systems as one resource to be used as wisely and efficiently as we can. By eliminating duplicative effort, unnecessary friction and inefficient allocations of jurisdiction, state and federal systems can contribute to each other's well being and the entire system can gain.

> [T]he goal of all actions brought under the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts.

North & S. Rivers, 949 F.2d at 556. That is the case here as well—duplicative citizen suits like CBE's will thwart the goals of the Clean Water Act.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA, *Petitioner*

v.

CITIZENS FOR A BETTER ENVIRONMENT CALIFORNIA, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondents offer three arguments in opposition to Unocal's Petition. First, they contend that the lower court rulings that Unocal did not pay a "penalty" within the meaning of the Clean Water Act were "fact-bound" findings inappropriate for review by this Court. Whether Unocal's payment was a penalty is not a fact question, but a matter of statutory interpretation that was litigated and decided below "*as a matter of law.*" (App. 55a, emphasis added)[1]

Second, Respondents contend there is no conflict among the circuits with regard to the "comparable State law" issue because this case concerns the citizen suit bar in subsection 1319(g)(6)(A)(iii) and the First and Eighth Circuit cases addressed the bar in subsection 1319(g)(6)(A)(ii). Yet the Ninth Circuit itself openly acknowledged that its decision is at odds with those of the other two circuits. (App. 10a-12a) Moreover, the use of the term "comparable State law" in subsections (ii) and (iii) presents a "classic case" for the rule that the same words used in different parts of one statute, especially when so closely intertwined, "are intended to have the same meaning." *C.I.R.* v. *Lundy*, __ U.S. __, 116 S.Ct. 647, 655 (1996).

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[1] Respondents proffer a number of incomplete quotations from the record in an attempt to controvert the expressed understanding of the Board, the EPA and the refiners that the payment was, in legal effect, a penalty. Respondents mistakenly state that "the Regional Board held that 'it is inappropriate to characterize the payment * * * as a penalty.'" (Opp. 5) However, the record reveals that the speaker quoted by Respondents was not a Board member, but Unocal's counsel, and that the quoted language is seriously out-of-context. Unocal's counsel explained that "for practical purposes, it is, in fact, a penalty. It's viewed by EPA as a penalty in its letter. I think the Board considers it a penalty." (ER 150) As the Petition points out, the only Board member to address the issue stated: "It is penalties, that's plain and simple what it is." (ER 140)

Third, Respondents contend that this citizen suit does not supplant a State enforcement action in violation of this Court's admonition in *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987), because the Regional Board "never commenced" an enforcement action against Unocal. (Opp. 4 n.7) The record is to the contrary. The Cease and Desist Order provides: "This Order is an action to enforce the laws and regulations administered by the Regional Board." (App. 77a ¶15) Thus, the record below demonstrates unequivocally that the State did take enforcement action against Unocal.[2]

In order to make this case appear unworthy of this Court's review, however, Respondents have inaccurately characterized the settlement of the enforcement action. Specifically, Respondents incorrectly state, "Unocal sued the state to invalidate the final limits, and the agreement to settle Unocal's case against the state expressly provided that Unocal's payment was not a penalty." (Opp. 24) This Court will not find in the record that the Settlement "expressly provided" that Unocal's payment is not a penalty. The Settlement simply says the refiners will pay $2 million. (App. 83a-85a) Similarly, Respondents' suggestion that Unocal would pay $780,000 "to settle [its own lawsuit] against the state" (Opp. 1, 24) is not only counterintuitive, but also completely unsupported by the record.

The payment was made to settle the Board's enforcement action. In fact, the Settlement explicitly incorporates the Regional Board's Cease and Desist Order as "an integral part of the settlement." (App. 85a ¶5) The Board's Order made clear that its "action to enforce" was necessary because "the

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[2] Although the Board action was commenced November 9, 1993 based upon anticipated violations of the final limits effective December 12, 1993 (ER 44, 63), the final Cease and Desist Order was not filed until January 19, 1994, one month after the final limits went into effect. (App. 81a)

dischargers will not be able to achieve compliance with the selenium limits" by the December 12, 1993 deadline. (App. 71a ¶4, 77 ¶15) Indeed, Respondents acknowledge elsewhere in their Opposition that Unocal's payment was made to defer further enforcement of the final limits until 1998. (Opp. 3, 7, 10 n.13, 27-28) That admission is consistent with the conclusion that Unocal's payment was a penalty for violation of the final selenium limits. Therefore, Unocal's settlement of the State's administrative enforcement action bars this duplicative and unnecessary citizen suit.[3]

A. Unocal's settlement payment was a "penalty" as a matter of law; the issue is not fact-bound.

Respondents contend Unocal should be deprived of the benefit of the Clean Water Act citizen suit bar because the question whether Unocal paid a penalty within the meaning of the Act is "fact-bound." (Opp. 9-13) Respondents seek to characterize this issue as "factual" in the hope this Court will be unwilling to grant review if a factual dispute underlies the petition.

Whether Unocal's settlement payment to the State is a "penalty" for purposes of the citizen suit bar is a pure question of law requiring interpretation of a federal statute, 33 U.S.C. § 1319(g)(6)(A)(iii). Although Respondents assert the district court made a "factual finding that the payment Unocal made was not a penalty" (Opp. 7), the district court actually ruled that the payment "was not, *as a matter of law*,

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[3] Contrary to Respondents' contentions as to the alleged impacts of selenium on San Francisco Bay (Opp. 1), the record shows that ambient concentrations of selenium in the Bay are significantly below even the most stringent federal standards. (ER 244 ¶ 16) Moreover, selenium from all six Bay refineries collectively is "dwarfed" by other selenium sources, including agricultural runoff. *Van Scoy* v. *Shell Oil Co.*, No. C 94-3827 FMS, 1995 U.S. Dist. LEXIS 5430 at n.1 (N.D. Cal. April 18, 1995).

a penalty within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii)." (App. 55a, emphasis added) The Ninth Circuit stated that it reviewed such "questions of law *de novo*." (App. 5a)[4] Therefore, this Petition raises a pure question of law whether Unocal's $780,000 payment to the State constitutes a penalty within the meaning of section 1319(g)(6)(A)(iii), barring a citizen suit.

As discussed in the Introduction, Unocal paid $780,000 to settle the Board's "action to enforce" the final permit limit for selenium. (App. 71a ¶ 4) Under California law, the only civil monetary liability available for such a permit violation is a penalty. Cal. Water Code § 13385. Unocal's payment was therefore a penalty as a matter of law. There was nothing else it could be.

B. Subsections 1319(g)(6)(a)(ii) and (iii) are inextricably intertwined; Respondents vainly attempt to separate the two subsections solely to avoid the circuit conflict which the Ninth Circuit itself acknowledged.

In the hope of avoiding review by this Court, Respondents deny the existence of a circuit conflict (Opp. 15) that even the Ninth Circuit opinion acknowledged and addressed. (App. 10a-12a) Specifically, Respondents contend there is no conflict among the circuits because the First and Eighth Circuits interpreted the "comparable State law" provision in subsection (ii) while the Ninth Circuit

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[4] Since this case arises from a Rule 12(b) motion to dismiss, the lower courts did not and could not make the four "findings of fact" claimed by Respondents. (Opp. 10-13) Rather, these were subsidiary issues of law underlying the "penalty" issue. Further, contrary to Respondents' assertion (Opp. 10), Unocal has consistently argued as it did in its opening brief in the Ninth Circuit that, "[a]s a matter of law, the payment required by the Regional Board was a 'penalty.'" (AOB 21-26)

construed subsection (iii) of section 1319(g)(6)(A). (Opp. 7-18)

Respondents do not suggest that the words "a State law comparable to this subsection" in (ii) mean something different from the words "such comparable State law" in (iii). The use of the word "such" in subsection (iii) plainly establishes that Congress intended the same meaning in both subsections. *United States* v. *Bowen*, 100 U.S. 508, 512 (1880) (the qualifying word "such" refers to words in the immediately preceding sentence of the statute). The "interrelationship and close proximity of these provisions" present a "classic case for applying the normal rule" that "identical words used in different parts of the same act are intended to have the same meaning." *C.I.R.* v. *Lundy*, 116 S.Ct. at 655.

The First and Eighth Circuits held that "comparable State law" refers to the State's statutory enforcement scheme *as a whole* rather than the specific State law section cited by the agency in support of its enforcement action. *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376, 381-382 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1094 (1995). In contrast, the Ninth Circuit held that "comparability" is determined by examining the precise statutory section cited by the State as the basis for its action, and that any penalty paid must be explicitly assessed under the penalty provision of State law that exactly mirrors the federal administrative penalty provision found in section 1319(g). (App. 12a)

Thus, there is a direct conflict among the circuits. Review by certiorari is warranted to overturn the Ninth Circuit's narrow approach, which requires not only that cases like this one turn on the State's formal, explicit recital of the source of its enforcement power, but also that such recital exactly mirror section 1319(g). Because the legal terminology may vary from state to state, and the substance

of the California enforcement action here included a penalty payment through settlement, "it would seem overly formalistic" to accord "significance to the presence or absence of an explicit reference." *Scituate*, 929 F.2d at 559 (concurring opinion).[5]

Under the First and Eighth Circuit decisions, the settlement payment would be considered a penalty paid under a "comparable State law." Certiorari is therefore justified to resolve the conflict by reversing the Ninth Circuit decision, which serves only to "balkanize" the application of the federal statute.[6]

C. Contrary to Respondents' theory, the Ninth Circuit decision conflicts with the admonition in *Gwaltney* that citizen suits should not supplant governmental action.

Respondents protest at length that the Ninth Circuit's ruling is consistent with this Court's decision in *Gwaltney*, 484 U.S. 49, and will not allow citizen suits to interfere with government enforcement of the Clean Water Act. (Opp. 19-22, 23-28) Respondents' contention is premised entirely on

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[5] As Respondents acknowledge (Opp. 6), the Regional Board considered a variety of enforcement options, including "imposition of an administrative penalty." (App. 77a ¶14) Because payment of a penalty had been achieved through negotiation, the Board concluded a formal penalty action was not required and instead took enforcement action by "settlement of the litigation and issuance of a cease and desist order." (*Id.*)

[6] Respondents also assert that the defendant in the Eighth Circuit case "sought to preclude a citizen suit" only under subsection (ii). (Opp. 14) In fact, the defendant "filed a motion for summary judgment on grounds that AWF's suit was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii)." *Arkansas Wildlife*, 29 F.3d at 378.

their assertion that the Regional Board did not take enforcement action or collect a penalty.

As explained above, the record shows that the Board itself described its Order as "an action to enforce" the final selenium limit. (App. 71a ¶4, 77a ¶15) Moreover, as also discussed above, Unocal's $780,000 settlement payment was a penalty for violation of the final limit. As a matter of law, there was nothing else it could be. Cal. Water Code § 13385.

Further, if Respondents were correct that the settlement here does not preclude a citizen suit, then the district court would have jurisdiction to impose penalties and grant injunctive relief. However, this Court stated in *Gwaltney* that where the government has either accepted an amount in settlement, or even agreed to forego penalties, a subsequent citizen suit for penalties undermines the enforcement discretion of the EPA and the State. *Gwaltney*, 484 U.S. at 61. It would be entirely inappropriate in circumstances like these, where $780,000 has already been paid, for a district court to impose any penalty. Similarly, a district court would need a powerful justification for granting injunctive relief inconsistent with that already ordered by the State and for requiring compliance with a discharge limit that the State regulators had concluded cannot be met with existing technology. (App. 73a)[7]

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[7] Respondents questioned Unocal's inability to meet the final selenium limits when three other refiners were able to do so. (Opp. 3 n.5) The Board rejected Respondents' claim, finding that the three refiners used different crude oil supplies and different processing methods not feasible for Unocal, Exxon or Shell. (ER 156-157) The Board also found it undisputed that there was "no known technology" for Unocal, Exxon or Shell to meet the limits. (App. 72a-73a) Shell did enter into a consent decree in another case to meet the final limit, but Respondents fail to disclose (Opp. 3 n.5) that the decree set the same July 31, 1998 deadline that the Board set for Unocal. (Plaintiffs' RJN 31)

If Respondents questioned the sufficiency of the amount paid by Unocal or the terms of the Cease and Desist Order, their remedy was to pursue administrative and judicial review under California law. Their remedy was not to file a citizen suit seeking to have a federal district court redetermine the issues resolved by the expert State regulators.

Because the Ninth Circuit is in direct conflict with *Gwaltney* in allowing a citizen suit where the State agency has already taken corrective enforcement action, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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